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Supreme Court, U.S.
FILED
JAN 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.———

IN THE

Supreme Court of the United States

October Term, 1986

Douglas A. Holmberg,

Petitioner,

v.

Rodney C. Morrisette and Mintex Corporation, a Minnesota corporation,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c) creates a private cause of action for any person injured in his business or property by reason of a violation of 18 U.S.C. § 1962(c). Section 1962(c) prohibits any person from conducting the affairs of an enterprise through a pattern of racketeering activity. A pattern of racketeering activity is defined to include at least two racketeering acts within a ten year period. 18 U.S.C. § 1961(5). A racketeering act is one of an enumerated list of criminal activities, including mail and wire fraud. 18 U.S.C. § 1961(1).

In the present case, the district court found that the individual respondent had conducted the affairs of the corporate respondent through a pattern of racketeering activity that included criminal acts which defrauded three individuals, three banks and an Illinois court over a prolonged period of time. The district court also found numerous acts of mail and wire fraud in furtherance of a pattern of criminal conduct. Accordingly, the district court found that petitioner had sustained an injury by reason of a violation of 18 U.S.C. § 1962(c).

Without challenging the trial court's factual findings, the Eighth Circuit Court of Appeals held, as a matter of law, that the statutory definition of a pattern of racketeering activity, 18 U.S.C. § 1961(5), means multiple criminal schemes involving numerous racketeering acts. Relying on its interpretation of the language of Section 1961(5) and the Supreme Court's decision in *Sedima S.P.R.L. v. Imrex Co., Inc.*, —U.S.—, 105 S.Ct. 3275 (1985), the Eighth Circuit reversed the district court's finding of civil liability under RICO.

By contrast, the Second, Fifth, Seventh and Eleventh Circuits have expressly or impliedly held that the statutory definition of a pattern of racketeering activity does not mean multiple schemes and numerous racketeering acts but as few as two racketeering acts committed within ten years of one another. *United States v. Teitler,* 802 F.2d 606 (2nd Cir. 1986); *United States v. Tom,* 787 F.2d 65 (2nd Cir. 1986); *R.A.G.S. Couture, Inc. v. Hyatt,* 774 F.2d 1350 (5th Cir. 1985); *Illinois Department of Revenue v. Phillips,* 771 F.2d 312 (7th Cir. 1985); *Bank of America National Trust and Savings Association v. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986). Presently, there is a sharp disagreement among the circuits regarding the meaning of the phrase "pattern of racketeering activity."

Therefore, this case presents the important question explicitly left open by this Court in *Sedima,* 105 S.Ct. at 3285 n.14 (1985):

> Whether the statutory definition of a "pattern of racketeering activity", 18 U.S.C. § 1961(5), means at least two or more criminal acts within a ten year period or multiple criminal schemes involving numerous racketeering acts.

LIST OF PARTIES

Parties to the proceedings below were petitioner Douglas A. Holmberg and respondents Rodney C. Morrisette and Mintex Corporation, a Minnesota corporation.*

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*Rule 28.1 list: Mintex Corporation has no parent companies, subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 800 F.2d 205 and is reprinted in the Appendix at pp. A-1 — A-16. The district court's Findings of Fact, Conclusions of Law, Order for Judgement and Memorandum is not officially reported and is printed in the Appendix at pp. A-16.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1986. A timely petition for rehearing en banc

was filed and, on October 16, 1986, the Court of Appeals entered its order denying Petitioner's petition for rehearing en banc. (App. A-46)

This Court's jurisdiction is invoked under and pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. §§ 1961-1968, as amended, (RICO), and 18 U.S.C. § 3575(e).

The relevant sections of these statutes are set forth in the Appendix at pp. A-46 — A-48.

STATEMENT OF THE CASE

A. The District Court's Findings of Fact and Conclusions of Law

After a seven day bench trial, the district court awarded treble damages under the Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations) 18 U.S.C. §§ 1961-1968 (as amended) ("RICO") and actual and punitive damages under two common law counts for fraud and conversion against respondents Rodney C. Morrisette ("Morrisette") and Mintex Corporation ("Mintex"). Jurisdiction of the district court was founded upon 18 U.S.C. § 1964(a) and 28 U.S.C. §§ 1331 and 1332.

In detailed findings of fact and conclusions of law the district court concluded that Morrisette had conducted the affairs of Mintex through a pattern of criminal conduct that included false representations to three individuals,

three banks and an Illinois state court over six months. (Appendix pp. A-21 — A-41) The district court found that Morrisette had engaged in a complicated scheme that involved altering documents and creating fictitious records for the purpose and with the intent of defrauding Holmberg, two other individuals and three banks. (App. A-24 — A-41)

The district court also concluded that Morrisette had conducted Mintex's affairs through a pattern of illegal activities directed at recovering monies and goods to which Mintex and Morrisette were not lawfully entitled. Specifically, the district court identified at least four distinct instances in which Morrisette committed fradulent acts against different victims. Those fraudulent acts had the same or similar purpose, motive and results and were accomplished through the use of the United States mails and interstate telephone and wire facilities. (App. at A-37 — A-45). The district court found that the purpose for Morrisette's unlawful conduct was the misappropriation of petitioner's $125,000 and the total misappropriation of goods and money in the amount of $429,000. (App. at A-32 — A-36). The false documents were intentionally created by Morrisette to wrongfully deprive the individuals of their funds and, accordingly, the district court found that Morrisette had acted with a willful indifference to petitioner's rights. (App. at A-41).

B. The Decision of the Court of Appeals

On appeal a three-judge panel of the Eighth Circuit Court of Appeals affirmed the district court's findings of fact with respect to the respondent's criminal activities. Jurisdiction in the Court of Appeals was invoked under 28 U.S.C. § 1291. It also affirmed the district court's findings of liability for actual and punitive damages on the fraud and conver-

sion claims. As a matter of law, however, the Eighth Circuit held that defrauding three individuals, three banks and an Illinois state court over a six month period of time could not constitute a pattern of racketeering activity within the meaning of the Act. Accordingly, the Eighth Circuit reversed the district court's conclusions of law on RICO and remanded the case for a determination of the amount of damages petitioner should recover with respect to his state law claims. Holmberg timely petitioned the Eighth Circuit for rehearing en banc and that petition was denied by an Order dated October 16, 1986.

REASONS THAT WRIT SHOULD BE GRANTED

A. The Decision Below Raises Questions Of Exceptional Importance Which Should Be Settled By This Court

The ruling of the Court of Appeals that the statutory definition of a pattern of racketeering activity means multiple criminal schemes involving numerous racketeering acts raises questions of exceptional importance expressly left open by this Court in *Sedima S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275, 3285 n.14 (1985).

In *Sedima* this Court acknowledged that RICO was being applied in situations not expressly anticipated by Congress and that it was evolving into something different from the original conception of its enactors. *Sedima S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275, 3287 (1985). Despite the unanticipated development of the law, the Court instructed that ". . . it is not for the judiciary to eliminate the private action in situations where Congress has provided it. . ." *Id.* at 3287. The Supreme Court concluded that if RICO was being applied in a fashion inconsistent with Congress' desires ". . . its correction must lie with Congress." *Id.* at 3287.

One of the issues which the Supreme Court considered, but did not resolve, was the definition of a pattern of racketeering activity. Although *Sedima* did not provide a definition it did provide instruction.[1] Specifically, in footnote 14, the Court stated as follows:

> As many commentators have pointed out, the definition of a 'pattern of racketeering activity' differs from the other provisions in § 1961 in that it states that a pattern '*requires* at least two acts of racketeering activity,' § 1961(5) (emphasis added), not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.' The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.' S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that '[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . .' 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of

[1]Footnote 14 is to be considered in light of the Supreme Court's insistence on strict adherence to the language of the statute. Efforts to restrict private civil RICO actions through interpretations which depart from or limit the language of the statute have been disfavored by the Supreme Court. See *Sedima*, 105 S.Ct. at 3284; *United States v. Turkette*, 452 U.S. 575, 580 (1981).

> Rep. Poff) (RICO 'not aimed at the isolated offender'); House Hearings, at 665. Significantly, in defining 'pattern' in a later provision of the same bill, Congress was more enlightening: 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789 (1975). *Sedima* at 3285.

Despite the Supreme Court's clear admonition that it is the role of Congress, and not the judiciary, to amend RICO, a number of courts have seized on the discussion of "pattern" in *Sedima* to curtail civil RICO actions.

Since *Sedima* four courts of appeals have addressed the "pattern" requirement. Those courts have embellished RICO's pattern requirement and generally applied at least four different tests. The least restrictive test requires only two related acts of mail or wire fraud to establish a RICO pattern. *United States v. Tom*, 787 F.2d 65, 68 (2d Cir. 1986); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1352 (5th Cir. 1985); *Illinois Department of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985). A second test requires a showing of more than one racketeering act and the threat of continuing activity. *United States v. Teitler*, 802 F.2d 606, 612 (2nd Cir. 1986); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986). A third test maintains that the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions.

Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986). A fourth and more restrictive test requires the existence of multiple schemes and evidence that the criminal conduct is a regular part of a defendant's business activity rather than an "aberration." *Superior Oil Co. v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986); *Holmberg v. Morrisette,* 800 F.2d 206, 208, 210 (8th Cir. 1986).

In the present case, the Eighth Circuit has adopted a restrictive interpretation of a pattern of racketeering activity that conflicts with the plain language of the statute, this Court's decision in *Sedima* and every other circuit that has considered the question. There are, therefore, questions of exceptional importance that are dividing the circuits which would be resolved by the granting of this Petition.

1. The plain language of the statute should control civil RICO actions.

A pattern of racketeering activity is defined at 18 U.S.C. 1961(5) as follows:

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

In the present case the individual respondent committed at least two acts of racketeering activity within ten years of each other in furtherance of criminal activities which defrauded three different individuals, three banks and an Illinois state court over a six month period. The Eighth Circuit did not challenge those factual findings. Instead

the Court of Appeals held that: "[T]here was no evidence that Mintex or Morrisette had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg v. Morrisette,* 800 F.2d 205, 210 (8th Cir. 1986). Thus, as a matter of law, Holmberg had failed to prove the continuity necessary to form a "pattern" of racketeering activity. *Id.* at 210.

The Court of Appeals read the statutory language of Section 1961(5) to mean that the defendant must be proved to be currently engaged in other criminal activities (i.e. multiple criminal schemes) or to have been engaged in like criminal activities in the past. *Id.* at 210. The Eighth Circuit's interpretation of the phrase "pattern of racketeering activity" has come to be known as the multiple criminal scheme and aberration test. *Superior Oil v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986);[2] *Ghouth v. Conticommodity Services, Inc.,* 642 F.Supp. 1325, 1335 n.14 (N.D. Ill. 1986).

The plain language of the statute simply does not support the Eighth Circuit's interpretation. Section 1961(5) cannot be reasonably construed to impose a multiple scheme requirement or a requirement that criminal activity must be a regular part of the defendant's business. The statute does not speak in terms of schemes — it speaks in terms of racketeering acts. The Act does not require the defendant to have engaged in like or similar activities in the past or to be currently involved in other criminal activities.

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[2]In *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986), the Eighth Circuit first articulated the multiple scheme and aberration test. In that case the Eighth Circuit held that mutiple related acts of mail and wire fraud as part of a single scheme to divert natural gas did not amount to a pattern of racketeering activity. In reaching its decision the Court of Appeals emphasized that, "there was no evidence suggesting that such activities had occurred previously or that the individuals involved were engaged in other criminal activities." *Id.* at 257.

The Eighth Circuit interpreted Section 1961(5) as adding requirements to the prosecution of private civil RICO actions that are not expressly contained in the statute. In doing so, it has engaged in a form of judicial legislation that the Supreme Court expressly rejected in *Sedima. Sedima,* 105 S.Ct. at 3287.[3]

Interpreting Section 1961(5) to require proof of multiple criminal schemes produces unintended results. As the Seventh Circuit has noted, a multiple criminal scheme requirement would permit ". . . defendants who commit a large and ongoing scheme, albeit a single scheme . . . [to] . . . automatically escape RICO liability for their acts . . ." *Morgan v. Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986). Thus, in the present case, even though respondent's conduct embraced acts that had the same or similar purpose, results, participants, victims and methods of commission and were not isolated events they could not amount to a pattern under the Eighth Circuit's interpretation of the statute.

Other courts, recognizing the absence of any statutory language that would support a multiple scheme requirement, and heeding the admonition in *Sedima* that extra-statutory limitations on RICO will not be tolerated, have ruled that a multiple scheme requirement cannot be read into the plain language of the Act:

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[3]The Eighth Circuit's actions in this regard are not dissimilar from the efforts of the Second Circuit which attempted to restrict the scope of the statute by imposing "prior criminal conviction" and "racketeering injury" requirements. *Sedima S.P.R.L. v. Imrex Co., Inc.,* 741 F.2d 482, 496 (2d Cir. 1984). The Second Circuit's "embellishments" were designed to discourage private civil actions and were rejected by the Supreme Court because they were unsupported by the statutory language. *Sedima.* 105 S.Ct. at 3286.

> In determining the meaning of a 'pattern of racketeering activity' this court is bound to the language of the RICO statute. That act defines what a 'racketeering activity' is. The act does not suggest that a 'pattern of racketeering activity' means a pattern of fraudulent schemes; it merely requires a pattern of 'racketeering activity.' *Sedima* does not compel a contrary interpretation.

Trak Microcomputer Corp. v. Wearne Bros., 628 F.Supp. 1089, 1096 (N.D. Ill. 1985); *Tryco Trucking Co. v. Belk Stores Services*, 684 F.Supp. 1327, 1334 (W.D.N.C. 1986) ("In its discussion of 'pattern,' neither RICO nor its legislative history refer to 'pattern' in terms of 'schemes.' The statute refers to 'acts,' two or more of which must be 'related' and in 'continuity' to constitute a 'pattern.' ")

In rejecting the Second Circuit's imposition of a prior criminal conviction requirement, the Supreme Court in *Sedima* noted that the word "conviction" did not appear in any relevant portion of the statute. *Sedima,* 105 S.Ct. at 3281. Likewise the terms and phrases used by the panel in *Holmberg, i.e.* "scheme", "like criminal activities" and "past criminal activities" do not appear in any relevant portion of the statute. Accordingly, RICO's plain language does not require evidence of a prior conviction or related criminal schemes in order to prove a pattern of racketeering activity.

Holmberg's multiple criminal scheme requirement is unsupported by the plain language of the statute and should be rejected.

2. The Court of Appeals decision conflicts with this Court's decision in Sedima.

The *Holmberg* decision is also inconsistent with the Supreme Court's discussion of pattern in *Sedima*. A careful

reading of footnote 14 to the *Sedima* opinion provides little comfort for the Eighth Circuit's rationale in *Holmberg*.[4] There is absolutely no reference whatsoever to a multiple scheme requirement. The Supreme Court did not hold that the defendant must have engaged in multiple criminal schemes to prove a threat of continuing criminal conduct. To the contrary, the Supreme Court described the definition in 18 U.S.C. § 3575(e) as enlightening:

> Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Sedima, 105 S.Ct. at 3285 n.14.

Whether criminal conduct forms a pattern is a factual determination that involves the purposes, results, participants, victims and methods of commission. In the present case, the district court made the factual determination that the respondent's conduct embraced acts that had the same or similar purpose and results. The participant was one and the same, namely respondent Morrisette, and there were multiple victims who were injured by similar acts. The methods of commission were substantially similar and related to each other. The events took place over a lengthy period of time and the course of conduct was continuous as opposed to being an isolated event. Furthermore, the district court made factual findings that satisfied both the statutory requirements and the Supreme Court's enlightened

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[4]A reading of *United States v. Turkette*, 452 U.S. 576, 583 (1981), a case that preceded *Sedima*, also indicates that a pattern is proved by ". . . evidence of the requisite number of acts of racketeering committed by the participants in the enterprise."

test for proving a pattern of racketeering activity. Yet, under the Eighth Circuit's reading of 18 U.S.C. § 1961(5) no pattern can be said to exist. That reading is inconsistent with the discussion of pattern in *Sedima*.

It is clear that the major focus of footnote 14 in *Sedima* was the need for a relationship between predicate acts. Thus, in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1356 (1985), Judge Wisdom of the Fifth Circuit read *Sedima* to mean that merely two "isolated" acts would not constitute a pattern. In *Bush Development Corp. v. Harbor Place Associates*, 632 F.Supp. 1359, 1366-67 (E.D.Va. 1986), the district court cited footnote 14 in its entirety and held that "it is clear from the quoted language that the Supreme Court's concern is directed towards instances where sporadic or isolated acts are alleged to form a pattern of racketeering activity, rather than to instances where the racketeering acts are so closely related that they can be said to be part of a single criminal episode." *Id.* at 1366. The court found that "in addition to turning the Supreme Court's reasoning on its head," a multiple scheme requirement would be out of line with the tenor of the remainder of the *Sedima* opinion which requires the RICO statute to be read broadly. *Id.*

Even those courts that have read *Sedima* as an invitation to restrict RICO have, with few exceptions, rejected the multiple scheme requirement adopted by the Eighth Circuit. Instead, they have adopted the relatively more liberal requirement of multiple episodes. In *Ghouth v. Conticommodity Services, Inc.*, 642 F.Supp. 1325 (N.D.Ill. 1986), Judge Aspen of the United States District Court for the Northern District of Illinois expressly rejected "the overly restrictive approach found in *Superior Oil*" and held that

different criminal "episodes"[5] which further one scheme constitute a "pattern." *Id.* at 1337 n.16. The court reviewed the post-*Sedima* case law and found that the most important factor in determining whether a course of conduct exhibits the continuity sufficient to constitute a pattern, "is that the criminal acts cause 'independent harmful significance,' i.e. cause more than one basic injury." *Id.* at 1336. The court reasoned that "whether or not there is one grand scheme to defraud, a pattern may exist if the multiple predicate acts are directed at and harm more than one person or entity. *Id.* The court's approach in *Ghouth* is in sharp contrast to the Eighth Circuit's holding in *Holmberg* that a single scheme with four episodes which defrauded four separate victims on different occasions could not, as a matter of law, constitute a pattern under RICO.

Another recent case that considered the "continuity" element of the RICO pattern requirement is *Papai v. Cremosnik,* 635 F.Supp. 1402 (N.D.Ill. 1986). In *Papai,* Judge Moran criticized the courts that have considered the RICO pattern requirement after *Sedima* for adopting an "I know it when I see it" style of discourse. *Id.* at 1410. The court stated that it was reluctant to follow either the episode or scheme test without exploring the public policy implications of such a choice. *Id.* The court reviewed the legislative history of the act and found that Congress had decided that ordinary commercial frauds should be included in RICO, and that to the extent RICO is used as a weapon against "white collar crime," this purpose is not contrary to the intent of Congress but in fact one of the "benefits" Congress

[5]Judge Aspen defined an "episode" as "transactions somewhat separated in time and place." 624 F.Supp. at 1335, citing *Graham v. Slaughter,* 624 F.Supp. 222, 224 (N.D.Ill 1985).

saw the act as providing. *Id.* The court ultimately held that proof of multiple episodes was sufficient evidence of continuity and rejected a multiple scheme requirement as contrary to the underlying purposes of RICO:

> Given all these policy considerations, we conclude that requiring plaintiffs to plead and prove multiple criminal schemes — in the sense either of the same scheme being perpetuated on different entities or different schemes inflicted on the same entities — is not in keeping with RICO's purpose. Although multiple schemes clearly evince a threat of continuing activity, requiring proof of a pattern of multiple schemes is a larger loophole for 'clever defendants and their lawyers,' *Haroco*, 747 F.2d at 390, than Congress intended.

Id. at 1412. In reaching this decision, Judge Moran rejected the Eighth Circuit's holding in *Superior Oil* that multiple criminal acts comprising a scheme to convert gas from Superior Oil's pipeline could not constitute a pattern. Judge Moran described *Superior Oil* as "perhaps the case which stretches the requirement of multiple schemes to its breaking point . . . ." *Papai* at 1408.

Of course, not even Judge Moran could have anticipated that the Eighth Circuit would extend the rationale of *Superior Oil* to a case as egregious as *Holmberg*. In the present case, the Eighth Circuit did not dispute the district court's findings that Morrisette was involved in numerous episodes of fraudulent conduct. Nor did the Eighth Circuit challenge the district court's findings that these fraudulent episodes involved the alteration, back-dating and fabrication of documents to defraud multiple victims over an extended period of time. If *Superior Oil* extended the multiple scheme requirement to the breaking point, *Holmberg* reveals the

multiple scheme requirement for what it really is — an act of judicial legislation that would eliminate civil RICO actions for commercial fraud.

The Eighth Circuit's RICO decisions also inevitably result in the creation of an "amorphous" standing requirement that is not supported by the language of the RICO statute or by this Court's decision in *Sedima*. In *Paul S. Mullin & Associates, Inc. v. Bassett*, 632 F.Supp. 532, 541 (D.Del. 1986), the court used an illustration to demonstrate the subjective nature of a multiple scheme requirement:

> This Court is loath to adopt a definition of pattern which turns on an assessment of whether one or multiple criminal schemes is involved. Such a definition would be highly susceptible to manipulative semantics. For example, an attempt by a racketeering enterprise to infiltrate General Motors could involve countless acts of mail fraud, extortion, securities fraud, and bribery. One could argue, however, that only one criminal scheme is involved because only one company was subverted. Under this view, a 'pattern' would come into existence only after the same enterprise began to infiltrate Chrysler or Ford. On the other hand, the enterprise, in infiltrating General Motors, undoubtedly had committed criminal acts of a sufficient number and variety, over a sufficient period of time, to suggest the existence of an elaborate design. This should be enough to create a 'pattern'.

The *Holmberg* decision has introduced new elements to the prosecution of a private civil RICO claim that are not in the statute and were not mentioned by the Supreme Court in *Sedima*. Without further guidance from this Court, lower courts will be free to use subjective constructs, such

as the multiple scheme test, to defeat a cause of action under the civil damage provisions of RICO.

3. The Holmberg Decision Is Inconsistent with the Decisions of the Second, Fifth, Seventh and Eleventh Circuits.

The Second, Fifth, Seventh and Eleventh Circuits have rejected the multiple scheme requirement in opinions issued after *Sedima. United States v. Teitler,* 802 F.2d 606, 611, 612 (2nd Cir. 1986); *United States v. Tom,* 787 F.2d 65, 68 (2nd Cir. 1986); *R.A.G.S. Couture, Inc. v. Hyatt,* 774 F.2d 1350, 1355 (5th Cir. 1985); *Morgan v. Bank of Waukegan,* 804 F.2d 970, 976-77 (7th Cir. 1986); *Illinois Department of Revenue v. Phillips,* 771 F.2d 312, 313 (7th Cir. 1985); *Bank of American National Trust and Savings Association v. Touche Ross,* 782 F.2d 966, 971 (11th Cir. 1986).

In *Illinois Department of Revenue,* the Seventh Circuit, concluded that the plain language of the statute supported a finding of "pattern" in *one* scheme that involved the mailing of nine fraudulent tax returns over a nine month period. 771 F.2d at 313. In *Bank of America National Trust and Savings Association,* a "pattern" was found to exist where the defendant engaged in one scheme to defraud lenders through the use of false and misleading financial statements. 782 F.2d at 969. In *R.A.G.S. Couture,* the Fifth Circuit found a pattern where there was one scheme to defraud and at least two related acts of mail and wire fraud. 774 F.2d at 1355. In *United States v. Tom,* the Second Circuit held that two acts of racketeering activity were sufficient to satisfy the "pattern" element in a criminal RICO action. 787 F.2d at 68. In *United States v. Teitler,* the Second

Circuit rejected what it considered to be the more "stringent" reading of footnote 14 in *Sedima* that would have required the prosecution to show the same or similar purposes, results, participants, victims or methods of commission. 802 F.2d at 611. According to the Second Circuit a pattern of racketeering activity is committed if the defendant committed at least two of the racketeering acts charged against him or her in the indictment. *Id.* at 612.

In *Morgan v. Bank of Waukegan,* the Seventh Circuit, in a recent decision, described the differences among the circuits on the question of pattern as a "thicket." 804 F.2d at 974. After surveying the state of the law the Court, in a decision that it believed was consistent with *Illinois Department of Revenue v. Phillips,* expressly rejected the proposition that the racketeering acts must occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement. According to the Seventh Circuit in *Morgan,* a multiple criminal scheme requirement would permit defendants who commit one large and ongoing scheme, albeit a single scheme, to automatically escape RICO liability for their acts. 804 F.2d at 975.

The RICO "pattern" issue is creating turmoil in the federal courts and will continue to do so until it is resolved. Numerous, conflicting pattern opinions are being published each month and the pace does not appear to be diminishing. Of course the present state of affairs was not entirely unanticipated. As noted by one lower court:

> Rather than taking the opportunity in *Sedima* itself to develop the 'meaningful concept of pattern' that Congress negelected to formulate, the Supreme Court has left this formulation to the lower courts. The resultant proliferation of diverse and contrary district court opinions is not surprising.

Ghouth, 624 F.Supp. at 1334 n.11. In addition, Justice Powell's dissenting opinion in *Sedima* warned that it would be difficult, if not impossible, to reconcile the Court's firm rejection of restrictions imposed by the Second Circuit, with a narrow construction of the Act's pattern requirement. *Sedima*, 105 S.Ct. at 3289, 3290.

The Supreme Court should not ignore the enormous amount of judicial resources that has been invested in interpreting the dicta in a single footnote in *Sedima*. Nor should it ignore the plight of RICO litigants, both plaintiffs and defendants, who are having their rights determined under a statute that is not being interpreted with any logic or consistency. The courts can no longer wait for Congress to provide a neat resolution to the "pattern" dispute like a *deux ex machina* in the last scene of a Greek tragedy. Congress has not enacted any major RICO legislation since the Act was passed in 1970 and has not made any changes in the legislation since this Court's opinion in *Sedima*.

Holmberg presents the Court with an opportunity to resolve the confusion that currently exists over the statutory definition of a pattern of racketeering activity. The Eighth Circuit has adopted the most restrictive approach among the circuit courts that have considered this issue and has done so in a case where the trial court's detailed findings clearly demonstrate that numerous victims were injured by the same or similar criminal acts over an extended period of time. By granting this Petition, the Court can resolve the uncertainty that has fractured the federal courts and frustrated RICO litigants since *Sedima*.

B. The Holmberg Decision Threatens to Create Different Standards of Review; One for Civil RICO and One for Criminal RICO.

The *Holmberg* decision is also a dramatic departure from the Supreme Court's prior holdings and creates two different standards of review: one for criminal RICO and one for civil RICO.

A "pattern" under criminal RICO need not be proved by evidence of multiple schemes. A criminal RICO violation is proved by evidence of the requisite number, i.e. two racketeering acts related to the affairs of an enterprise. *Turkette,* 452 U.S. at 583; *United States v. Weatherspoon,* 581 F.2d 595, 602 (7th Cir. 1978). It is well-established that criminal cases do not require racketeering acts to be related to each other and do not require multiple criminal schemes in order to support a conviction. *United States v. Tom,* 787 F.2d 65, 68 (2d Cir. 1986); *United States v. Aleman,* 609 F.2d 298, 304 (7th Cir. 1979); *United States v. Davis,* 576 F.2d 1065, 1067 (3d Cir. 1978); *United States v. Elliott,* 571 F.2d 880, 899 n. 23 (5th Cir. 1978); *United States v. Dean,* 647 F.2d 779, 787 (8th Cir. 1981). The multiple scheme requirement articulated in *Holmberg* has not been applied in a criminal RICO setting by any courts that have considered the issue. Thus, there are two different standards.

The multiple scheme test, as adopted in *Holmberg,* is contrary to the teachings of *Sedima* and *Turkette* and is based on the notion that civil RICO should be limited to situations where the defendant's criminal activity is so extensive that it could only be implemented by professional criminals. Thus, the *Holmberg* court complained that there was no evidence that the defendant was engaged ". . . in other criminal activities." *Holmberg,* 800 F.2d at 210.

The Eighth Circuit referred to the defendant's forgeries and other fradulent activities as ". . . in one sense . . . a misguided attempt. . . ." *Id.* Unfortunately, every criminal endeavor is "in one sense a misguided attempt." That hardly distinguishes the respondent in the present case from a common criminal and does not entitle his criminal conduct to a standard of review that is different from that of any other criminal — professional or otherwise.

In *Sedima,* this Court made it clear that RICO applied equally to "misguided" businesspersons who act criminally and professional criminals. The Court held:

> Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises . . . the former enjoy neither an inherent capacity for criminal activity nor immunity for its consequences.

Sedima, 105 S.Ct. at 3287.

The question of whether there should be a different standard for fraudulent businesspersons has been answered in *Sedima.* The *Holmberg* decision would do indirectly that which the Court in *Sedima* expressly rejected: an exception for "misguided" but nevertheless fraudulent conduct perpetuated by otherwise "legitimate" businesspersons. *Sedima,* 105 S.Ct. at 3285.

Application of the related multiple scheme test in situations like *Holmberg* severely weakens both civil and criminal enforcement of RICO. The *Holmberg* rationale undermines Congress' purpose, conflicts with the language of the statute and is inconsistent with this Court's holdings in *Turkette* and *Sedima.*

CONCLUSION

The Supreme Court recognized the need for a meaningful definition of "pattern" when it issued its decision in *Sedima*. Now that the issue is squarely before it on the basis of a complete record after a trial on the merits, the Court has the opportunity to resolve an extremely important question of statutory interpretation. In terms of the number of courts and litigants affected this may be one of the more significant petitions for certiorari that the Court will be asked to consider this term. Petitioner speaks for a great many other participants in the judicial system in respectfully praying that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on September 3, 1986.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Court of Appeals
For The Eighth Circuit

No. 85-5138

Douglas A. Holmberg,

Appellee,

v.

Rodney C. Morrisette and Mintex Corporation, a Minnesota corporation,

Appellants.

Appeal from the United States District Court
for the District of Minnesota

No. 85-5221

Douglas A. Holmberg,

Appellee,

v.

Rodney C. Morrisette and Mintex Corporation, a Minnesota corporation,

Appellants.

Appeal from the United States District Court
for the District of Minnesota

Submitted: December 10, 1985
Filed: September 3, 1986

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and BOWMAN, Circuit Judge.

BOWMAN, Circuit Judge.

This appeal is from a judgment entered after a bench trial finding defendants Rodney C. Morrisette and Mintex Corp. (Mintex) liable for treble damages under the Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. §§ 1961-1968 (as amended) (RICO), and for actual and punitive damages under two common-law counts for fraud and conversion for submitting falsified documentation to draw down a letter of credit provided by Douglas A. Holmberg, the plaintiff in this action. The District Court awarded Holmberg $375,000 in damages, $4,478 in costs, and $35,383 in attorneys' fees. We affirm the District Court's finding of liability for actual and punitive damages on the fraud and conversion claims. We reverse the finding of liability on the RICO claim and the award of attorneys' fees, and remand for a determination of the amount of damages Holmberg should recover with respect to his state law claims.

I.

This case arose from a series of business transactions between an American manufacturer, an American exporter, and a Nigerian buyer. Mintex, a Minnesota corporation, produces wall plaques and other commemorative materials.

Morrisette, a Florida resident, is president of and holds fifty percent of the shares of Mintex. Trans World Services, Inc. (Trans World) is a Minnesota corporation engaged in export trading. Typically, Trans World provided security for its purchases of goods by obtaining a letter of credit from a third party, such as plaintiff Douglas A. Holmberg in this case. Trans World would be the initial beneficiary of the letter of credit, but then would transfer it to the benefit of a domestic supplier to secure the transaction. If the buyer did not pay Trans World for the goods and Trans World in turn did not pay the supplier, the latter could use the letter of credit to obtain payment.

In September and October 1981, Mintex agreed to supply Trans World with certain commemorative plaques destined for shipment to a Nigerian importer, G.N.A. Hamzer & Co. (Hamzer). Trans World was to secure the purchase with a letter of credit, but Mintex reserved the right to accept or reject the terms of the letter of credit. In September, Holmberg agreed to furnish Trans World a letter of credit for $125,000 in exchange for a portion of Trans World's profits on its sales of the plaques. In October, Holmberg bought an irrevocable, unconditional, and transferable letter of credit naming Trans World as the beneficiary.

Trans World soon began placing orders with Mintex. By mid-December, Mintex had produced $65,232 worth of plaques that were shipped to Hamzer in Nigeria. From February 1982 through May 1982, Mintex produced $264,021 worth of goods that Trans World shipped to Wood Dale, Illinois for storage. Mintex lacked purchase orders from Trans World for $112,956 of these goods, and $71,540 of the goods were designated for RJC Enterprises, of which Morrisette was a part owner.

Holmberg's first letter of credit expired in April 1982 without being cashed. In July, Trans World requested and Holmberg provided another $125,000 letter of credit designating Trans World as the beneficiary. Trans World forwarded the letter of credit to defendants, who requested an alteration in the terms of the letter of credit. Rather than requiring an ocean bill of lading. Morrisette wanted to change the terms to "any bill of lading." The parties finally compromised on allowing either an air or ocean bill of lading. Payment on the letter of credit was predicated on shipment of the goods to Hamzer, which was completely at Trans World's discretion, and defendants could not draw down the letter of credit until a fixed time after the goods had been shipped. Trans World could decide. for whatever reason, not to ship the goods to Hamzer and not to pay Mintex, leaving Mintex without recourse against the letter of credit.

In August, Trans World agreed to transfer Holmberg's letter of credit to Mintex as beneficiary and to name Mintex as beneficiary on a $25,000 letter of credit that Gilbert Watson obtained from a Minnesota bank. In late August. Mintex sent a letter through the United States mail to Holmberg's bank in Miami, Florida requesting transfer of the letter of credit from Trans World to Mintex. Morrisette and the Miami bank had at least one telephone conversation concerning this transfer. In September, defendants sent a request via Federal Express to Holmberg's bank requesting payment of the letter of credit. The documents submitted by them indicated that $193.964 worth of plaques had been manufactured and shipped to Hamzer in October and November 1981. The bank concluded that the documents complied with the letter of credit and paid Mintex $125.000.

In fact, the documents were false and misleading. Trans World had shipped only $65,232 worth of goods to Hamzer by September 1982, and this was known to Mintex. Hamzer was a customer of Trans World, not Mintex, and thus owed Trans World for the goods shipped. Hamzer certainly did not owe Mintex the $193 964 claimed on the documents accompanying the letter of credit. Morrisette admitted at trial that the corresponding invoices designating Hamzer rather than Trans World as the buyer were not created until August or September 1982, though Mintex back-dated them to October and November 1981. Moreover, the attached air bills of lading did not correspond to the invoices, but had been altered to conceal the actual amount of goods shipped so that no one would notice the discrepancy in dollar value between the invoices and the air bills.

Mintex also drew down two other letters of credit related to the transactions at issue here. In September 1981, Peter DeJongh purchased a $25,000 letter of credit through a Minnesota bank, Mintex eventually was made the beneficiary of this letter of credit, and was entitled to draw down upon it by presenting an ocean bill of lading showing shipment of goods to Nigeria and associated invoices. In June 1982, Morrisette requested and received payment of this letter of credit in person by presenting invoices from Trans World and bills of lading. As previously noted, in August 1982, Mintex was also named the beneficiary of Watson's $25,000 letter of credit, which had been issued to Trans World in August 1981. Between April and mid-October 1982, Morrisette and Watson's bank had numerous telephone conversations and several exchanges of correspondence through the United States mail concerning Morrisette's efforts first to transfer and then to draw down Wat-

son's letter of credit. On October 15, 1982, Morrisette presented the bank with documents showing shipment of over $25,000 in goods and received $25,000 in payment.

Concurrent with these actions, on October 9, 1982, Mintex commenced a replevin action in Illinois to recover the $264,021 worth of goods Trans World had stored in Wood Dale.[1] In its complaint, Mintex represented that it owned the goods.

In his complaint in this case, Holmberg alleged that Morrisette and Mintex had: (1) committed common-law fraud in drawing down Holmberg's letter of credit; (2) converted Holmberg's funds; (3) engaged in a pattern and practice of racketeering activity in violation of RICO; and (4) acted with willful indifference to Holmberg's rights and were therefore liable for punitive damages. He sought actual damages of $125,000 under each of the first two counts. He also claimed the same amount under the RICO count, which would be trebled under that statute to $375,000. Finally, Holmberg sought punitive damages as well as attorneys' fees, costs, and interest.

After a bench trial, the District Court concluded that Holmberg had prevailed against defendants on all four counts of the complaint. As to the common-law fraud claim, the court concluded that defendants fraudulently collected payment on Holmberg's letter of credit "by knowingly presenting materially false and misleading documents to [Holmberg's b]ank with the intent that the bank would rely on the false documents to pay the proceeds of Holmberg's

[1]We note that the value of the goods to Mintex, absent shipment to Hamzer, would have been only a small fraction of the invoiced price. These goods consisted of commemorative plaques for use in connection with a specific Nigerian presidential election and their value depended on the timeliness of their delivery to Nigeria.

[letter of credit]. The . . . [b]ank did rely on the presented documents and, as a result, paid out on Holmberg's [letter of credit]," thereby damaging Holmberg. *Holmberg v. Morrisette*, No. 3-83-1383, at 23 (D. Minn. Feb. 1, 1985). The District Court similarly found that defendants' presentation of fraudulent documents to Holmberg's bank constituted a conversion of Holmberg's funds. Damages were set at $125,000 for each count plus costs, attorneys' fees, and interest. The District Court also found that defendants had acted with willful indifference to Holmberg's rights and that Holmberg was entitled to $250,000 in punitive damages.

The District Court found defendants liable under RICO for conducting a pattern of racketeering predicated on mail and wire fraud. The District Court specifically relied on defendants' having obtained payment of the Holmberg, Watson, and DeJongh letters of credit by using the United States mail to submit fraudulent documents and a telephone to make communications in connection with those transactions. On the RICO claim, the court awarded Holmberg $375,000 (treble damages) plus costs, attorneys' fees, and interest. The court then concluded that Holmberg's damages under the RICO claim subsumed his damages under the fraud, conversion, and punitive damages claims and thus finally awarded Holmberg a total of $375,000 in damages, $4,478 in costs, and $35,181 in attorneys' fees. The court noted that should the RICO award be overturned on appeal, the damages on the fraud and conversion claims should be awarded only to the extent that they are not duplicative.

Defendants now assert numerous grounds for reversing all or part of the District Court's judgment. They first contend that the District Court erred in finding liability under RICO because Holmberg failed to prove defendants engaged

in mail or wire fraud. They also assert that even if Holmberg proved the necessary acts under 18 U.S.C. § 1961, those acts do not amount to a pattern of racketeering as required under RICO.[2] Defendants next argue that the District Court's finding that they fraudulently drew down Holmberg's letter of credit is clearly erroneous. Moreover, they contend that the District Court should have barred Holmberg's claim under the clean hands doctrine. Defendants further assert that, as a matter of law, Holmberg was not entitled to punitive damages. Finally they argue that Holmberg was not entitled to attorneys' fees under either the RICO or the common-law claims.[3]

II.

A.

Defendants contend that Holmberg failed to prove that they engaged in a pattern of racketeering activity as required under RICO, 18 U.S.C. § 1962(c).[4] We agree. A violation of section 1962(c) "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."

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[2]Defendants raised several other RICO issues in their briefs which, as they later conceded, the Supreme Court since has decided adversely to them in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985). We do not address those issues.

[3]In a related argument, defendants contend that the trial judge should have recused himself from determining attorneys' fees because his son was an associate in the law firm representing Holmberg. This issue is mooted by our decision that the District Court erred in holding that Holmberg is entitled to attorneys' fees, so we do not address the merits. We observe in passing that the District Court appears to have complied with the applicable law. *See United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463-64 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

[4]Defendants also argue that Holmberg failed to prove they committed two or more acts of mail or wire fraud. We do not reach this argument because of our disposition of the RICO "pattern of racketeering activity" issue.

Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3285 (1985) (footnote omitted). Assuming that Holmberg established that defendants engaged in "conduct of an enterprise" and that the conduct amounted to "racketeering activity," we nevertheless believe that defendants' actions do not constitute the requisite "pattern" of racketeering activity.

This Court thoroughly discussed the parameters of "pattern" in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1985). In *Superior Oil*, we held that several related acts of mail and wire fraud as part of a single scheme to divert natural gas from Superior Oil's pipeline did not amount to a pattern of racketeering activity. There was no evidence suggesting that such activities had occurred previously or that the individuals involved were engaged in other criminal activities. *Id.* at 257. We believe that the present case is legally indistinguishable from *Superior Oil*.

Under RICO, a pattern "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity. . . ." 18 U.S.C. § 1951(5). Congress further expressed its views of the interrelationship necessary for actions to constitute a pattern:

> The concept of "pattern" is essential to the operation of the statute. . . . The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

S. Rep. No. 617, 91st Cong. 2d Sess. 158 (1969), *quoted in United States v. Dean*, 647 F.2d 779, 792 n.32 (8th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982). The Supreme Court cited this report in *Sedima*, 105 S. Ct. at 3285 n.14, prefacing it with the observation that "[t]he implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.' The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern." *Id.* The Court went on to note that the sponsor of the Senate bill pointed out that "pattern" requires a relationship between the actions. *Id.* (citing 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan)). Elsewhere in the Omnibus Crime Control Act of 1970, Congress provided that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). The Supreme Court expressly approved use of this definition as an aid to interpreting "pattern" under RICO. *Sedima*, 105 S. Ct. at 3285 n.14.

We assume for purposes of our review that Holmberg proved that defendants committed acts of wire or mail fraud related to a common purpose or scheme. Our review of the record convinces us, however, that Holmberg has failed, as a matter of law to prove the continuity necessary to form a "pattern" of racketeering activity. Defendants' actions comprised one scheme to draw down the three letters of credit securing Mintex's transactions with Trans World with respect to goods specially produced by Mintex for shipment to Nigeria. In one sense, defendants' actions were

a misguided attempt to obtain payment for goods which they had produced, yet over which they had lost control. There was no evidence that Mintex or Morrisette had engaged in like activities in the past or that they were engaged in other criminal activities. As we observed in *Superior Oil*, " '[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity." ' " 785 F.2d at 257 (citing *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 931 (N.D. Ill. 1985)) (footnote omitted). Thus we reverse the judgment for Holmberg on his RICO claim.

B.

Defendants argue that the District Court erred in concluding that Morrisette fraudulently drew down Holmberg's letter of credit. In support of their argument, they contend that Holmberg wrongfully changed the letter of credit from a "sales" to a "stand-by" letter of credit. Defendants also argue that the nature of the letter of credit was ambiguous and that this ambiguity should be construed against Holmberg, who gave his bank specific language to be included in the document and who in that respect was the draftsman of the instrument. In addition, they assert that the arrangement between Trans World and Holmberg, including Holmberg's alleged power to approve or authorize the shipment of goods to Nigeria, constituted a joint venture. Accordingly, defendants argue that Holmberg cannot take refuge behind the letter of credit, since he was liable to them as a purchaser of the goods. They urge this Court to look beyond the form of the transaction and to consider the purpose of the letter of credit, which was to preserve the beneficiary's

(Mintex's) right to payment for the goods it produced and sold to Trans World.

We may review *de novo* the District Court's determination that the facts as he found them constituted actionable fraud. Because the elements of common-law fraud are a matter of state substantive law, we look to the law of Minnesota. *Hanson v. Ford Motor Co.*, 278 F.2d 586, 590 (8th Cir. 1960). Applying Minnesota law to the facts of this case, we agree with the District Court that Holmberg established all the elements of the tort of fraud. *Davis v. Re-Trac Manufacturing Corp.*, 149 N.W.2d 37, 38-39 (Minn. 1967), *citing Hanson,* 278 F.2d at 591. Defendants knowingly made material, false representations about past and present facts, intending that Holmberg's bank act upon those representations by making payment upon Holmberg's letter of credit. The bank accepted the falsified documents that defendants presented and in reliance on them paid defendants $125,000. Accordingly, Holmberg, who then was obligated to repay the bank suffered injury that was the proximate result of defendants' intentional misrepresentations.

Whatever ambiguity there may have been in the terms of Holmberg's letter of credit, it could not provide a sufficient justification for submitting falsified documents to draw down the letter of credit. The same conclusion applies to defendants' argument that Trans World and Holmberg were engaged in a joint venture and also to their argument calling upon us to look to the purpose of the letter of credit. The District Court specifically found that Trans World, Holmberg, and Hamzer did not constitute a joint venture, a finding that is not clearly erroneous. Moreover, even if we assume that the joint venture and purpose arguments are correct, at most they would suggest that defendants had a

cause of action against Trans World and Holmberg for the price of the goods; they cannot shield defendants from liability for the fraud they committed in wrongfully obtaining payment on the letter of credit. We therefore affirm the judgment in Holmberg's favor on his fraud and conversion claims.

C.

In a closely related contention, defendants assert that the District Court erred in not barring Holmberg's claims as a matter of law under the clean hands doctrine. The District Court found that Holmberg acted in good faith and did not have unclean hands. These are factual findings. Our review of the record satisfies us that they are not clearly erroneous. Thus, we need not explore the interesting question, which the parties did not raise, of whether Minnesota law permits application of the clean hands doctrine, traditionally an equitable defense, in an action at law for money damages. *See generally* D. Dobbs, *Law of Remedies* 45-47 (1973).

D.

Defendants contend that Holmberg is not entitled to punitive damages. Under Minnesota law punitive damages are allowable in civil actions "only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." Minn. Stat. § 549.20(1). The statute adds that any award of punitive damages is to be measured by a series of factors bearing on the purpose of punitive damages, including the profitability to the defendant of his conduct, the duration of the conduct, the financial condition of the defendant, and the total effect

of other punishment imposed on the defendant (*e.g.*, actual damages, costs and attorneys' fees). *Id.* § 549.20(3). In this context, the Minnesota Supreme Court has held that "[i]n reviewing an order of the trial court, we are confined to an examination of the record to ascertain whether there is evidence to sustain the judge's action." *Melina v. Chaplin,* 327 N.W.2d 19, 20 (Minn. 1982).

In the present case, we find there is substantial evidence in the record to support the District Court's determination that punitive damages are allowable. We are concerned, however, that the amount of the punitive damage award may be excessive, and especially so in view of our reversal of the judgment for Holmberg on his RICO claim. Accordingly, on remand the District Court should reconsider the amount of the punitive damage award in light of this opinion and the statutory factors.

E.

Defendants argue that the District Court erred in granting Holmberg's request for attorneys' fees. We agree. The District Court awarded attorneys' fees under the RICO claim and also under the state law fraud and conversion claims. Obviously, in light of our prior disposition of the RICO claim, Holmberg is not entitled to attorneys' fees under 18 U.S.C. § 1964(c). Because under our decision Holmberg has prevailed only on his state law claims, we look to Minnesota law to resolve the issue of attorneys' fees. *See United States ex rel. Garrett v. Midwest Construction Co.,* 619 F.2d 349, 353 (5th Cir. 1980).

The Minnesota Supreme Court long and consistently has held "that attorney fees are not recoverable in litigation

unless there is a specific contract permitting or a statute authorizing such recovery." *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983); *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 79 (Minn. 1981). Holmberg has not referred us to any contract or statute (other than RICO) authorizing his recovery of attorneys' fees. The District Court's judgment does not indicate on what basis or under what authority attorneys' fees were awarded with respect to the state law claims. Accordingly, we do not see any basis for departing from the Minnesota Supreme Court's traditional rule, and therefore we reverse the award of attorneys' fees to Holmberg.

III.

For the reasons set forth above, we reverse the District Court's judgment for Holmberg on the RICO claim and the award of attorneys' fees. We affirm the District Court's finding of liability on the fraud, conversion, and punitive damages claims, and we remand the case for a new determination of the damages that Holmberg should recover on those claims. In so doing, we note that a recovery of compensatory damages on both the fraud and conversion claims clearly would be duplicative and should not be allowed. Holmberg has suffered only one injury — the wrongful drawing down of his letter of credit — and is entitled to be compensated for that injury only once. Similar reasoning applies to the question of punitive damages on both the fraud and conversion claims. Fraud and conversion are separate legal theories of liability, but in reality defendants have injured Holmberg only once. Accordingly, they are to be punished only once, not as many times as there are separate legal theories that have been found to fit the case.

Affirmed in part, reversed in part, and remanded.

A true copy.

Attest:
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Douglas A. Holmberg,

Plaintiff,

vs.

Rodney C. Morrisette and Mintex Corporation, a Minnesota corporation,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT, AND MEMORANDUM

Civil No. 3-83-1383

The above-entitled matter was tried before the undersigned on November 26, 1984 through December 6, 1984. Joseph W. Anthony of Larkin, Hoffman, Daly and Lindgren appeared on behalf of plaintiff Douglas A. Holmberg. Stephen J. Peatty of Hessian, McKasy and Soderberg appeared on behalf of defendants Mintex Corporation and Rodney C. Morrisette.

Based upon the oral testimony, documentary evidence,

arguments of counsel and entire file, the Court enters its Findings of Fact, Conclusions of Law and Order for Judgment as follows:

FINDINGS OF FACT

1. Plaintiff Douglas A. Holmberg ("Holmberg"), a resident of the State of Florida, is employed as a junior high school teacher and is the owner and operator of three citrus tree nurseries.

2. Defendant Mintex Corporation ("Mintex") is a Minnesota corporation which produces and manufacturers wall plaques and other recognition and commemorative materials, for sale and shipment in interstate and foreign commerce.

3. Defendant Rodney C. Morrisette ("Morrisette"), a resident of the State of Florida, is employed as a Republic Airlines pilot, and is the president and fifty percent (50%) shareholder of defendant Mintex Corporation.

4. In March or April of 1981, Holmberg was introduced to TransWorld Services, Inc. ("TWS"), a Minnesota corporation engaged in the business of export trading.

5. TWS had two major foreign customers located in Nigeria — Amoje Trading Co. and G.N.A. Hamzer and Co. ("Hamzer"). TWS' business consisted mainly of buying goods in the United States and exporting them to buyers in foreign countries, particularly Nigeria. TWS would secure a purchase by obtaining a letter of credit (LC) from an outside party such as Holmberg. TWS would be the named beneficiary under the LC. TWS would then transfer the LC to the benefit of a domestic supplier to secure the transaction.

6. Using an LC, TWS would then purchase the goods and sell them to customers in Nigeria. The goods would be shipped to Nigeria under terms that required the Nigerian importer to pay within thirty (30) to sixty (60) days after receiving the goods. If the Nigerian importer did not pay for the goods after receiving them, and if TWS did not pay the supplier, the domestic supplier would have the lender's LC as security for the purchase by TWS. If the domestic supplier met the terms of the LC it could "draw down" the LC to obtain payment.

7. Sometime before September 18, 1981, plaintiff was advised by his banker that such an LC transaction in which plaintiff would guaranty the performance of TWS involved "considerable risk."

8. On September 18, 1981, Holmberg entered into a "Loan Agreement" with TWS in which Holmberg agreed to provide an LC to TWS. Holmberg had had no experience with this type of LC, nor had he had experience in exporting or importing.

9. According to the Loan Agreement, Holmberg as "lender" was to provide certain "collateral" to TWS. This collateral (the LC) would insure payment to domestic manufacturers or suppliers of goods who sold to TWS.

10. As consideration for providing the LC, TWS agreed to pay Holmberg a "domestic fee." The fee was forty percent (40%) of TWS' profit on goods purchased from domestic manufacturers and suppliers for which plaintiff Holmberg's LC was used to insure payment. TWS' profit was seventy-five percent (75%) of its gross markup over the domestic vendor's price.

11. The Loan Agreement also provided that if TWS received additional income from an importer of goods shipped against Holmberg's LC, Holmberg would receive a "foreign fee" equal to forty percent (40%) of TWS' "foreign profit." TWS' "foreign profit" was seventy-five percent (75%) of any additional income received by it from the importer.

12. On October 6, 1981, Holmberg purchased an LC of one hundred twenty-five thousand dollars ($125,000) from the Southeast First National Bank of Miami ("Southeast Bank"). Holmberg designated TWS as the beneficiary. TWS provided the language for the October 6, 1981 LC.

13. The October 6, 1981 LC was irrevocable, transferable and unconditional, and was identified as STB1099.

14. On October 6, 1981, Holmberg understood that the beneficiary of his LC and any subsequent transferee could draw down on the LC if its terms and conditions were satisfied.

15. On September 3 and 4, and October 23, 1981, TWS and Mintex entered into written agreements for TWS' purchase of products from Mintex. Mintex and Morrisette knew TWS would be selling to a buyer in Nigeria and that TWS would be securing the purchases with an LC.

16. In the Purchase Agreement of September 3, 1981, Mintex reserved the right to accept the LC supplied by TWS. That agreement specifically provided as follows:

> *Conditions:* Supplier reserves right to accept conditions of Purchase order and Letter of Credit.

17. After executing the written agreements TWS began placing purchase orders with Mintex. The purchase orders were identified by export shipment order numbers. The first number in the sequence was 115.01. TWS would submit

its purchase order to Mintex, and upon receipt, Mintex's office manager would create a three part invoice using one of Mintex's preprinted form invoices. The preprinted invoices were numbered consecutively and each invoice number was preceded by a preprinted "M." After the invoice was prepared, one of the three parts would be given to production. The two remaining parts would remain with the office manager. After the purchase order was filled, one part of the invoice would be mailed to the customer for payment; one part would be used by the office manager to complete the accounts receivable ledger card and would then be discarded; and the third part would be filed in the customer's file.

18. Mintex maintained a file and an accounts receivable ledger card for each of its customers. Mintex had a file and an accounts receivable ledger card for TWS. It did not have, and has never had, an accounts receivable ledger card for Hamzer.

19. Mintex made the following sales to TWS during the months of October and November 1981:

Inv. Date	Inv. No.	Cust. PO	Amount	Ship Date	Description[1]
10/21/81	M13998	not shown	$ 1,266.00	not shown	033 Presidential Plaques
10/26/81	M13994	115.01	18,462.50	10/26/81	350-003 Plaques (Presidental)
10/27/81	M13995	115.02	18,462.50	10/27/81	350-003 Presidential Plaques
10/30/81	M13997	115.03	15,825.00	10/30/81	300-003 Presidential Plaques
11/25/81	M14086	115.05	2,465.00	11/25/81	NPN Plaques
			$56,481.00	TOTAL	

[1][Inv. Date — Invoice Date; Inv. No. — Invoice Number; Cust. PO — Customer Purchase Order; Ship Date — Shipment Date].

20. As of November 25, 1981, Mintex was owed fifty-six thousand four hundred eighty-one dollars ($56,481) for goods TWS had purchased for shipment to Nigeria. The products identified on Invoices ## M13998, M13394, M13995, M13997, and M14086 were purchased by TWS from Mintex and shipped to Hamzer in Nigeria.

21. From February 17, 1982 through May 31, 1982, Mintex continued to sell goods to TWS. According to Mintex's accounts receivable ledger card and invoices, Mintex sold to TWS goods valued at two hundred sixty-four thousand twenty-one dollars ($264,021) during this time. When Mintex delivered the goods they were forwarded by truck to West Wind Maritime in Wooddale, Illinois where they were stored.

22. The carriers billed all charges to TWS for shipment of the goods manufactured by Mintex. The bills of lading identified TWS as the shipper of the goods.

23. Of the two hundred sixty-four thousand twenty-one dollars ($264,021) in goods sold by Mintex and shipped to Wooddale, Mintex did not have purchase orders from TWS for one hundred twelve thousand nine hundred fifty-five dollars and fifty cents ($112,955.50).

24. Of the two hundred sixty-four thousand twenty-one dollars ($264,021) in goods sold by Mintex seventy-one thousand five hundred forty dollars ($71,540) of them were sold to RJC Enterprises. Morrisette was an owner of RJC Enterprises which was located in the Cayman Islands.

25. On May 31, 1982, the status of TWS' account with Mintex was as follows:

Date	Mintex Number	Tws P.O. Number	Mintex Invoice Amount to TWS	Shipped to	Mode of Transportation
10/21/81	M13998	N/A	$ 1,266.00	Nigeria	Air-Lufthansa
10/26/81	M13994	115.01	18,462.50	"	"
10/27/81	M13995	115.02	18,462.50	"	"
10/30/81	M13997	115.03	15,825.00	"	"
11/25/81	M14086	115.05	2,465.00	"	"
12/17/81	M14152		8,750.75	"	"
1981 TOTAL			$ 65,231.75		
2/17/82	M14437	115.04	$ 7,865.00	Chicago	Truck-Britton
2/17/82	M14438	115.08	7,865.00	"	"
2/17/82	M14439	115.12	5,005.00	"	"
2/17/82	M14440	115.05	6,285.75	"	"
2/17/82	M14441	115.13	8,750.75	"	"
2/17/82	M14442	115.17	8,750.75	"	"
2/17/82	M14443	115.21	1,355.75	"	"
2/17/82	M14466	115.38*	35,000.00	"	"
2/19/82	M14467	115.39*	36,540.00	"	"
3/3/82	M14469	115.21	7,395.00	"	"
3/3/82	M14470	115.25	3,081.25	"	"
3/12/82	M14713	115.25	5,669.50	"	"
3/12/82	M14714	115.29	616.25	"	"
3/23/82	M14715	115.29	8,134.50	"	"
3/23/82	M14716	115	8,750.75	"	"
3/12/82	M15164**	None	102,602.50	"	"
3/23/82	M15165**	None	10,353.00	"	"
1982 TOTAL			$264,020.75		
GRAND TOTAL			$329,252.50		

*Purchased by RJC Enterprises
**No purchase orders from TWS

26. On November 6, 1981 Holmberg's LC #STB1099, drawn to the benefit of TWS, was transferred to defendant Mintex. LC #STB1099 was thereafter released to TWS, reassigned, and retransferred to Mintex on March 31, 1982. The transfer of the LC #STB1099 to Mintex by TWS provided that it was of an "irrevocable, transferable, standby letter of credit" and that "documents presented under this transfer will be in the name of Mintex Corporation." On April 5, 1982, LC #STB1099 expired without being cashed.

27. On July 19, 1982, TWS again asked Holmberg to provide an LC of one hundred twenty-five thousand dollars ($125,000.00). This LC was issued by the Southeast Bank on July 19, 1982. It was numbered L03542 and designated TWS as the beneficiary.

28. LC #L03542 stated it was available for payment. "... Upon presentation of your draft at sight drawn on us, bearing the clause: 'Drawn under Letter of Credit No., L03542 of Southeast Bank, N.A.' and accompanied by the following documents:

1. Statement purportedly signed by you stating as follows: 'Amount claimed is due us from GNA Hamzer Co. as invoices have not been paid beneficiary, or domestic manufacturer or, suitable arrangements made within 120 days after date of shipment from U.S. port as evidence by the on-board date of ocean bill of lading showing the shipment of product as determined by TransWorld Services, Inc. on authorization of lender.'

2. Copy of on-board ocean bill of lading dated at least 120 days prior to drafts presented under this contract.

3. Copy of invoice(s) in amounts equal to or greater than drawings under this credit and dated at least prior to drafts presented under this credit."

29. On or about July 19, 1982, Holmberg caused the LC to be mailed to John Hamilton, an officer of TWS.

30. Hamilton, in his capacity as an officer of TWS, mailed Holmberg's LC #L03542 through the United States mails to Mintex and Morrisette.

3. After Morrisette received LC #L03542 he met with one Peter Cozzetto and one Richard Ludgate to review its terms. That meeting occurred in late July 1982, at which time Cozzetto advised Morrisette that the LC could not be drawn down unless an ~~ocean~~ bill of lading was presented with the documents. Both Cozzetto and Ludgate were familiar with export trade and the use of LC's.

32. As of July 31, 1982, Mintex had not shipped any goods by ocean and did not possess any ocean bills of lading.

33. After meeting with Cozzetto and Ludgate, Morrisette telephoned and made personal visits to Hamilton asking Hamilton to obtain Holmberg's consent to amend the LC to allow Mintex to draw down on the LC by presenting "any bill of lading."

34. Both Hamilton and Holmberg rejected Morrisette's request to amend the LC to permit presentment of any bill of lading. Hamilton then telephoned Holmberg and obtained Holmberg's agreement to amend LC #L03542 to include presentment of air as well as ocean bills of lading.

35. On August 4, 1982, TWS entered into a written agreement with Mintex to transfer LC #L03542 to the benefit of Mintex. On that date, TWS also agreed to name Mintex as beneficiary on an LC of twenty-five thousand dollars ($25,000) from one Gilbert Watson. As a part of the agreements to obtain Holmberg and Watson's LCS, Mintex agreed as follows:

"August 4, 1982

3. Mintex Corporation for its part, agrees not to affect a drawn down on either Letter of Credit prior

to sixty (60) days of this date or before the time stipulated in the Letter of Credit itself, which ever period is longest."

36. Mintex, Morrisette, and TWS signed one of the above-described agreements on August 5, 1982. Morrisette was aware of the agreement's time limits on the drawing down of Holmberg's LC.

37. Holmberg relied on the August 4, 1982 agreement when he permitted the amendment to LC #L03542 authorizing the presentment of air or ocean bills of lading to the bank.

38. Pursuant to the agreement between TWS and Mintex, on August 20, 1982, TWS, the then beneficiary of LC #L03542, instructed the Southeast Bank to amend the LC to name Mintex the beneficiary. TWS' transfer instructions permitted invoice substitution providing:

"The transferee's draft and documents are to be applied to the terms and conditions of the credit and any amendments in lieu of our draft and documents."

39. On August 25, 1982, on behalf of Mintex Corporation, Morrisette sent a letter through the United States mails to Southeast Bank requesting the transfer of Holmberg's LC from TWS to Mintex.

40. Morrisette had telephone communications with a representative of the Southeast Bank about obtaining a transfer of Holmberg's LC from TWS to Mintex.

41. On August 31, 1982, the Southeast Bank advised TWS and Mintex that it could not process the transfer application because an improper form had been used. The

Southeast Bank, then returned the transfer application, the LC, and another form.

42. On September 7, 1982, TWS executed the transfer form and delivered to Mintex a copy of the transfer, a letter from Hamilton, and a copy of a letter from Patricia King, Corporate Secretary of TWS, to the Southeast Bank.

43. The letter to Mintex from Hamilton acknowledged that the "standby" LC had been transferred to Mintex and recited that: "It is understood that your documents presented under this transfer will be in the name of Mintex Corporation." A copy of this letter was sent to Holmberg by TWS, and to the Southeast Bank, along with the transfer form dated September 7, 1982.

44. On September 9, 1982, Holmberg's LC #L03542 was transferred and assigned to Mintex, naming Mintex Corporation as the beneficiary of the LC. The terms of the LC #L03542 then provided that the LC could be drawn down:

> ". . . Upon presentation of your draft at sight drawn on us, bearing the clause: 'Drawn under Letter of Credit No. L03542 of Southeast Bank, N.A.' and accompanied by the following documents:
>
> 1. Statement purportedly signed by you stating as follows: 'Amount claimed is due us from GNA Hamzer Co. as invoices have not been paid beneficiary, . . . or domestic manufacturer, or suitable arrangements made within 120 days after date of shipment from U.S. port as evidenced by the on-board date of air or ocean bill of lading showing the shipment of product as determined by Trans World Services, Inc. on authorization of lender.'

2. Copy of on-board air or ocean bill of lading dated at least one hundred twenty (120) days prior to drafts presented under this contract.

3. Copy of invoices(s) in amounts equal to or greater than drawings under this credit and dated at least prior to drafts presented under this credit."

45. On September 14, 1982, Mintex and Morrisette sent a letter by Federal Express to the Southeast Bank together with enclosures requesting payment of Holmberg's LC #L03542. In support of the request to cash the LC, Morrisette and Mintex supplied the following documents to the Southeast Bank:

1. A draft/direct collection letter.

2. A site draft in the amount of one hundred twenty-five thousand Dollars ($125,000);

3. A statement as follows:

   Amount claimed is due us from G.N.A. Hamzer Co. as invoices have not been paid beneficiary, or domestic manufacturer, or suitable arrangements made within 120 days after date of shipment from U.S. port as evidence by the on-board date of air or ocean bill of lading showing shipment or product as determined by TransWorld Services, Inc., on authorization of lender.

4. Invoice Nos. 2640/S1, 2641/S1, 2642/S2, 2643/S1, together with certified copies of original air bills of lading allegedly showing the shipment of goods to Nigeria.

46.The invoices that were mailed by Mintex and Morrisette to the Southeast Bank contained the following information:

Inv. Date	Inv. No.	Cust. PO	Amount	Ship Date	Description[2]
10/26/81	2640/S1	115.01	$ 60,146.20	10/26/81	2.150 PCS. (70 Bundles) Wall Plaques
10/27/81	2641/S1	115.02	60,072.30	10/27/81	2,147 PCS. (70 Bundles) Wall Plaques
10/30/81	2641/S1	115.03	69,558.25	10/30/81	1,780 PCS. (58 Bundles) Wall Plaques
11/25/81	2643/S1	115.05	4,187.90	11/25/81	100 PCS. (8 Boxes) Wall Plaques
			$193,964.00	TOTAL	

47. The Southeast Bank, relying on the documents presented, cashed Holmberg's LC and paid Mintex one hundred twenty-five thousand dollars ($125,000) which it wired to Mintex's account at the Eden Prairie State Bank of Eden Prairie, Minnesota on September 14, 1982.

48. As of September 14, 1982 TWS had made no payments to Mintex for any of the goods produced and delivered for shipment to TWS by Mintex. Mintex had complied with the terms of its agreements with TWS and was entitled to payment from TWS at this time.

49. The invoices submitted to the Southeast Bank, although dated October and November 1981, were not created until August or September of 1982. The invoices were created for the purpose of cashing Holmberg's LC.

50. In presenting LC # L03542 to the Southeast Bank for draw down on September 14, 1982, Mintex and Mor-

[2][Inv. Date — Invoice Date; Inv. No. — Invoice Number; Cust. PO — Customer Purchase Order; Ship Date — Shipment Date]

risette represented that Hamzer owed Mintex one hundred ninety-three thousand nine hundred sixty-four dollars and sixty-five cents ($193,964.65).

51. According to Mintex's own acocunts receivable ledger, no amount was due and owing to Mintex from Hamzer on September 14, 1982.

52. Morrisette represented to the Southeast Bank that the information contained on the invoices was true and correct. Morrisette and Mintex also represented to the Southeast Bank that on the 26th, 27th, 30th, and 31st of October 1981, pursuant to invoice ## 2640/S1, 2641/S1, 2642/S1, and 2643/S1, Mintex had shipped one hundred ninety-three thousand nine hundred sixty-four dollars ($193,964) in goods (including freight charges) by air carrier to Nigeria under the air bills which were attached to the invoices. These representations were untrue and Morrisette knew they were untrue. Mintex and Morrisette made those representations to the Southeast Bank knowing they were false and intending that the Southeast Bank would rely on them to pay the proceeds of Holmberg's LC.

53. The representations made by Mintex and Morrisette to the Southeast Bank were false in the following material respects:

a. As of November 5, 1981, goods and freight of one hundred ninety-three thousand nine hundred sixty-four dollars ($193,964) were reflected on the invoices presented but Mintex had not shipped them by air carrier to Nigeria. Mintex and Morrisette's representations to the Southeast Bank that goods and freight valued at one hundred ninety-three

thousand nine hundred sixty-four dollars ($193,964) had been shipped on or before November 25, 1981, by Lufthansa Airlines to Nigeria were untrue.

b. The dates appearing on the invoices submitted to the Southeast Bank did not accurately reflect the actual dates of invoicing. The invoices presented to the Southeast Bank were back-dated to October 1981, but were actually created in August or September of 1982. The back-dated invoices created in August or September of 1982 were prepared by Mintex and Morrisette for the purpose of drawing down Holmberg's LC by misleading the Southeast Bank.

c. Mintex and Morrisette attached copies of air bills of lading to the invoices submitted to the Southeast Bank. Mintex and Morrisette represented to the Southeast Bank that the air bills attached to Invoices ## 2640/S1, 2641/S1, 2642/S1, and 2643/S1 corresponded with each other. The air bills were attached to the invoices to create an appearance that they corresponded with each other. In fact, the air bills did not correspond with the invoices. Mintex and Morrisette attached the air bills of lading to the invoices for the purpose and intent of deceiving the Southeast Bank.

d. The air bills attached to the invoices submitted to the Southeast Bank were materially altered by Mintex and Morrisette. On each air bill submitted to the Southeast Bank the portion of the air bill

which would have indicated the declared value of the goods for customs purposes was intentionally concealed. The concealment was accomplished by the placement of a purported certification over the declared value of the air bill. On the uncertified copies of the original air bills, the amount of the declared value of the goods for customs purposes was significantly lower than the amount appearing on the invoices submitted to the Southeast Bank. The certification of the four air bills was done to conceal the actual amount of goods shipped by the original air bills from the Southeast Bank.

e. To make it appear as though Invoice ## 2640/S1, 2641/S1, 2642/S1, and 2643/S1 corresponded with the air bills that were attached to them, Mintex and Morrisette caused to have typed on the back-dated invoices and corresponding air bill numbers data from earlier sales to TWS. The attached air bills did not correspond with the invoices because the goods reflected on the invoices were never shipped by those air bills to Nigeria. Mintex and Morrisette intended to and did cause the Southeast Bank to rely on their representations that the air bills attached to the invoices presented for payment corresponded with each other. In fact, they did not.

54. The Southeast Bank relied on the documents Mintex and Morrisette presented when it drew down Holmberg's LC and wire transferred the one hundred twenty-five thousand dollars ($125,000) to Mintex and Morrisette's bank in Eden Prairie.

55. Although Morrisette and Mintex represented that one hundred ninety-three thousand nine hundred sixty-four dollars ($193,964) had been shipped to Nigeria, TWS had shipped to Nigeria only goods valued at approximately sixty-five thousand dollars ($65,000).

56. On September 25, 1981, the First Bank-Pipestone of Pipestone, Minnesota issued an irrevocable LC of twenty-five thousand dollars ($25,000) for its customer, one Peter DeJongh. Mintex was the beneficiary of this LC. As the beneficiary, Mintex was entitled to draw down on DeJongh's LC upon presentment of an onboard ocean bill of lading showing shipment of goods to Nigeria.

57. On June 10, 1982, Mintex drew down on DeJongh's LC of twenty-five thousand dollars ($25,000.00). The draw down was accomplished in person, as was the deposit of its proceeds in Mintex's bank account. To draw down DeJongh's LC, Morrisette personally presented to First-Bank Pipestone Mintex invoices ## M13994, M13995, and M13997 from TWS and memorandum bills of lading.

58. When Mintex and Morrisette requested the draw down of DeJongh's LC, they were aware that they had not shipped any goods by ocean bill of lading and did not possess an ocean bill of lading reflecting the shipment of any goods.

59. On June 10, 1982, the documents presented by Mintex and Morrisette to the First Bank-Pipestone, Morrisette specifically represented as follows:

> I acknowledge Mintex has complied with all requirements and amount claimed is due us from Alhaji (Dr.)

Garba Nautan Hamza as invoices have not been paid beneficiary within one hundred twenty (120) days after day of shipment from U.S. Port, as evidenced by the on-board of ocean bill of lading or February 15, 1982, whichever date is the latter.

The copies of invoices accompany this letter as evidence of dates and shipping information.

60. The representations made to the First Bank-Pipestone by Morrisette were untrue. As of June 10, 1982, Mintex had not complied with the terms of DeJongh's LC and had not shipped goods by an ocean bill of lading. Morrisette knew these representations were false.

61. When Mintex and Morrisette presented the documents to First Bank-Pipestone they intended to cause the First Bank-Pipestone to rely on those documents and to pay the proceeds of DeJongh's LC to them.

62. First Bank-Pipestone relied on the representations made by Morrisette in paying the twenty-five thousand dollars ($25,000) to Mintex and Morrisette.

63. On August 13, 1981, the First National Bank of Anoka ("First National") issued an LC of twenty-five thousand dollars ($25,000) for one Gilbert Watson.

64. Beginning in April 1982, Morrisette initiated communications with Steven Schmitt, an officer of First National, for the purpose of drawing down Watson's LC.

65. Between April, 1982 and October 15, 1982, Morrisette and Schmitt had numerous telephone conversations regarding Morrisette's efforts to draw down Watson's LC.

66. On April 19th, May 26th, and August 10th of 1982, Schmitt sent letters through the United States mails to Morrisette regarding Mintex's efforts to draw down Watson's LC.

67. On August 10, 1982, Schmitt wrote to Morrisette and transferred Watson's LC from TWS to Mintex. The same day, Schmitt wrote to TWS advising it of the amendment to Watson's LC.

68. On two occasions before October 15, 1982, Morrisette presented documents to Schmitt at the First National Bank for the purpose of drawing down Watson's LC. On both occasions, Schmitt told Morrisette that the documents did not conform to the terms of Watson's LC.

69. Watson's LC required the presentment of an on-board ocean bill of lading showing shipment of all goods. As of October 15, 1982, Mintex had not shipped any goods by ocean and did not have ocean bills of lading reflecting shipment of any goods.

70. On October 15, 1982, Mintex, through one of its officers or employees, presented documents to Jeffrey Sanderson, an officer of First National, for the purpose of drawing down Watson's LC. Sanderson had had prior dealings with Morrisette when Morrisette was a customer and Sanderson an employee of the First National Bank of Wayzata.

71. On October 15, 1982, without the presentment of an ocean bill of lading, First National Bank paid twenty-five thousand dollars ($25,000) to Mintex on Watson's LC. The same day, Mintex borrowed forty thousand dollars ($40,000) from First National.

72. Before obtaining the forty thousand dollars ($40,000) loan on behalf of Mintex, Morrisette had obtained a personal loan of forty thousand dollars ($40,000) from First National.

73. Mintex and First National had an understanding that Mintex would repay at least twenty-five thousand dollars ($25,000) of the forty thousand dollar ($40,000) loan within ten (10) days of October 15, 1982.

74. On October 25, 1982, Mintex repaid the forty thousand dollar ($40,000) loan to First National.

75. Morrisette, as president of Mintex, directed Mintex's affairs so as to cause Mintex to present false and misleading documents to First Bank-Pipestone and First Bank of Anoka in order to draw down funds to which neither Mintex nor Morrisette was lawfully entitled.

76. Mintex, on October 9, 1982, commenced a replevin action in Du Page County Illinois Circuit Court to recover the two hundred sixty-four thousand twenty dollars and seventy-five cents ($264,020.75) of goods stored in Wooddale, Illinois by TWS. In the action Mintex in its verified complaint by its counsel, represented that it was the owner of these goods. Mintex knew it was not the owner and that it had sold the goods to TWS.

77. On February 25, 1983, the Honorable Donald D. Alsop, Judge of the United States Circuit Court, District of Minnesota, appointed LeRoy Sydness, Kriene Kramer, and plaintiff Holmberg, to a committee to "supervise and manage the operations of TransWorld Services, Inc. . . . with respect to the collection of accounts and accounts receivables for goods and materials shipped by TWS to

Nigeria." *Sydness v. Trans-World Services, Inc.*, Civ. No. 3-83-194 (D. Minn. Feb. 25, 1983).

78. The committee did not have authority over goods not shipped by TWS to Nigeria. The goods that were shipped by Mintex to Wooddale, Illinois, had not been shipped to Nigeria and thus, were not subject to the committee's authority.

79. On April 11, 1983, TWS filed for protection under Chapter 11 of the Bankruptcy Act. The goods that the committee was supervising were listed as assets in the Chapter 11 filing and as of April 11, 1983, were subject to the jurisdiction of the bankruptcy court.

80. On April 25, 1983, the committee met with Hamzer to receive offers from Hamzer for settlement of outstanding accounts. On April 25, 1983, Hamzer made offers to settle those accounts but because of TWS's April 11, 1983 bankruptcy filing, neither the Alsop committee nor Holmberg believed they had the power to enter into a binding agreement with Hamzer covering the goods that had been sold by TWS. Therefore, Hamzer's offers were never accepted by the committee.

81. The committee's term expired on April 26, 1983.

82. On May 11, 1983, Holmberg and other creditors obtained relief from the automatic stay in the bankruptcy court and petitioned Judge Alsop to reappoint the committee, or to appoint a receiver to take possession of the goods sold by TWS to Hamzer. On June 14, 1983, Judge Alsop appointed Robert Henson as the receiver.

83. When the Southeast Bank paid Mintex one hundred twenty-five thousand dollars ($125,000), Holmberg was damaged because he incurred a one hundred twenty-five thousand dollar ($125,000) liability to the Southeast Bank. Interest on that debt has accrued at fifteen percent (15%) per annum compounded from September 14, 1982 to the present.

84. As a result of his LC being cashed, Holmberg has incurred legal and other expenses in attempting to recover his funds and has incurred damages of thirty thousand dollars ($30,000).

85. Holmberg's damages of one hundred twenty-five thousand dollars ($125,000) were liquidated and ascertainable as of September 14, 1982.

86. Punitive damages in the amount of two hundred fifty thousand dollars ($250,000) are reasonable in this case. As of April 1982, Morrisette had a net worth in excess of one million dollars ($1,000,000). As of December 31, 1982, Mintex owned assets valued in excess of six hundred thousand dollars ($600,000) and had annual sales exceeding one million dollars ($1,000,000).

CONCLUSIONS OF LAW

1. The Court has diversity jurisdiction because plaintiff is a resident of the state of Florida, Mintex is a citizen of a state other than Florida, and Mintex's principal place of business is not in Florida. Morrisette is also a resident of a state other than Florida, and the amount in controversy exceeds ten thousand dollars ($10,000) exclusive of interest and costs. The Court has federal question jurisdiction

under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964. Venue is proper under 18 U.S.C. § 1965, in that Mintex and Morrisette reside and transact their business within Minnesota.

2. The documents Morrisette and Mintex presented to the Southeast Bank did not satisfy the terms of Holmberg's LC and the one hundred twenty-five thousand dollars ($125,000) payment to Mintex constituted a conversion of Holmberg's funds by Mintex and Morrisette. Morrisette, as Mintex's president, and as the person responsible for requesting and delivering the documents to the Southeast Bank is liable, jointly and severally with Mintex, for conversion of one hundred twenty-five thousand dollars ($125,000).

3. As to Count One of the Complaint, Holmberg is entitled to judgment against Mintex and Morrisette, jointly and severally, for one hundred twenty-five thousand dollars ($125,000) plus costs and attorneys' fees. Holmberg is entitled to interest of six percent (6%) per annum from September 15, 1982 to July 1, 1984. *See* Minn. Stat. § 334.01 (1984). Interest of nine percent (9%) per annum is to be calculated by the Clerk of Court from July 1, 1984 to the date of judgment, *See* Minn. Stat. § 549.09.

4. As to Count two, the Court concludes that Morrisette and Mintex fraudulently obtained Holmberg's one hundred twenty-five thousand dollars ($125,000) by knowingly presenting materially false and misleading documents to the Southeast Bank with the intent that the bank would rely on the false documents to pay the proceeds of Holmberg's LC. The Southeast Bank did rely on the presented documents and, as a result, paid out on Holmberg's LC.

5. Morrisette and Mintex received and retained Holmberg's one hundred twenty-five thousand dollars ($125,000) on the basis of the presentment of false and misleading documents, to Holmberg's detriment.

6. Morrisette and Mintex are jointly and severally liable to Holmberg for one hundred twenty-five thousand dollars ($125,000) plus costs, attorneys' fees, and interest at the rate of six percent (6%) per annum, from September 14, 1983 to July 1, 1984. Minn. Stat. § 334.01 (1984). Plaintiff is also entitled to interest of nine percent (9%) per annum from July 1, 1984, to the date of judgment to be calculated by the Clerk of Court. Minn. Stat. § 549.09 (1984).

7. Defendant Morrisette is a person and Mintex is a distinct enterprise within the meaning of 18 U.S.C. §§ 1961 and 1962.

8. Morrisette conducted the affairs of Mintex Corporation through a pattern of racketeering activity which included at least two (2) acts of mail and wire fraud within a ten (10) year period.

9. By conducting Mintex's affairs through a pattern of racketeering activity, Morrisette violated 18 U.S.C. §§ 1962 and 1964(c).

10. Holmberg was injured by Morrisette's conduct in directing the affairs of Mintex. Morrisette conducted Mintex's affairs through a pattern of illegal activities directed at recovering monies and goods to which Mintex and Morrisette was not lawfully entitled. While directing Mintex's affairs, Morrisette committed the following acts:

a. Fraudulently obtained payment of DeJongh's letter of credit.

6. Fraudulently obtained payment of Holmberg's letter of credit.

c. Fraudulently obtained payment of Watson's letter of credit.

11. Through Morrisette's illegal activities, Mintex received one hundred seventy-five thousand dollars ($175,000) to which it was not lawfully entitled. While conducting Mintex's business and in furtherance of his fraudulent scheme, Morrisette used the United States mails and interstate telephone and wire facilities to unlawfully convert Holmberg's one hundred twenty-five thousand dollar ($125,000) LC.

12. Holmberg is entitled to damages by reason of Morrisette's violation of 18 U.S.C. § 1962 in the amount of three hundred seventy-five thousand dollars ($375,000). These damages represent the proceeds of plaintiff's LC multiplied three-fold. The plaintiff shall also receive costs and reasonable attorneys' fees as provided for in 18 U.S.C. § 1964(c). Holmberg is also entitled to and, in the Court's discretion, is granted judgment for interest from September 14, 1982, to the date of judgment to be calculated by the Clerk of Court.

13. As to Count Four of Holmberg's Complaint, Mintex and Morrisette acted with willful indifference to Holmberg's rights and Holmberg is entitled to punitive damages in the sum of two hundred fifty thousand dollars ($250,000.00).

14. Although the Court has found violations of Counts One through Four (1-4) of the Complaint, plaintiff may not recover under each count if such recovery amounts to duplication, as it does here. Since the Court finds that recovery under Count Three (3) subsumes recovery under Counts One, Two, and Four (1, 2 & 4) plaintiff is entitled to recover as damages only those amounts set forth in paragraph 12 above.

15. Holmberg is directed to file with this Court within ten (10) days of this Order a verified petition setting forth with particularity the attorneys' fees and costs incurred by him in prosecuting this action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 1, 1985

/s/ROBERT G. RENNER
United States District Judge

MEMORANDUM

I. Introduction

In its Findings, the Court has rejected defendants' theory that TWS was not the true buyer of Mintex goods but was part of a joint venture involving Dr. Hamza and Holmberg. Contrary to defendant's position, the Court also finds that plaintiff acted in good faith. Defendants admitted they were not innocent or blameless. They contended, however, that plaintiff too had unclean hands and should be denied relief. The Court disagrees. While the extensive findings obviate the need for a comprehensive memorandum, the court be-

lieves that two issues should be addressed — the RICO cause of action and the matter of damages.

II. RICO

The circuit courts disagree as to the parameters governing private civil actions under the Racketeer Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. *Alexander Grant & Co. v. Tiffany Industries,* 742 F.2d 408 (8th Cir. 1984); *Bennett v. Berg,* 685 F.2d 1053, 1057 (8th Cir. 1983) (en banc), *cert. denied,* 104 S.Ct. 1882 (1983); *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 741 F.2d 482 (2d Cir. 1984), *cert. granted,* 53 U.S.L.W. 3495 (Jan. 15, 1985); *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984); *Haroco v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384 (7th Cir. 1984), *cert. granted,* 53 U.S.L.W. 3496 (Jan. 15, 1985); *Schact v. Brown,* 711 F.2d 1343 (7th Cir. 1983), *cert. denied,* 104 S.Ct. 508 (1984). The United States Supreme Court has recently granted certiorari in several cases interpreting RICO. *Sedima S.P.R.L. v. Imrex Co., supra; Haroco v. American National Bank & Trust Co. of Chicago, supra.* The Court trusts these decisions will provide greater guidance to the lower courts in future RICO cases.

The elements of a civil RICO claim are as follows: 1) a person; 2) who conducted the affairs of; 3) a distinct enterprise; 4) through a pattern; 5) of racketeering activity; 6) with injury to business or property; 7) by reason of a violation of § 1962. 18 U.S.C. §§ 1962, 1964(c); *Bennett v. Berg,* 608 F.2d at 1060. Morrisette qualifies as a "person" under RICO. 18 U.S.C. § 1961(3). As the president of Mintex, Morrisette acted in Mintex's name but was distinct from Mintex. Mintex is a separate entity incorporated

under Minnesota law. It conducts its own manufacturing business and maintains its own business records. Therefore, Mintex qualifies as a "distinct enterprise" for RICO purposes. *See* 18 U.S.C. § 1961(4); *Bennett v. Berg*, 608 F.2d at 1060.

Under this circuit's present interpretation of RICO, the Court has concluded that Morrisette conducted the affairs of Mintex through a pattern of racketeering activity in violation of 18 U.S.C. § 1962. A "pattern" is defined in RICO as at least two acts of racketeering activity within a ten year period. 18 U.S.C. § 1961(5). "Racketeering activity" includes mail and wire fraud. *Id.* § 1961(1).

Morrisette committed at least two acts of mail and wire fraud in drawing down the Holmberg and Watson letters of credit. Two elements establish a violation of the mail fraud statute: a) the formation of a scheme with intent to defraud; and b) the use of the mails in furtherance of that scheme. 18 U.S.C. § 1341.

Morrisette devised a scheme to recover money owed to Mintex from its sales of goods to TWS. The scheme was accomplished through the fraudulent draw downs on the DeJhong, Holmberg, and Watson letters of credit, and through the replevin action in Illinois. In drawing down the Holmberg and Watson letters of credit, Morrisette used the United States mails. Although Morrisette did not initiate all the mailings, he knew his actions might naturally result in others using the mails. Such evidence is sufficient to show that Morrisette used the mails in furtherance of his fraudulent scheme. *United States v. Keanne*, 522 F.2d 534, 551 (7th Cir. 1975), *cert denied*, 424 U.S. 976 (1976). The scope of the wire fraud statute is equally as broad. *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975), *cert.*

denied, 424 U.S. 911 (1976). Consequently Morrisette's use of the telephone in connection with these illicit transactions constituted wire fraud.

The defendants argue with particular vehemence that plaintiff's injury was not caused "by reason of a violation of section 1962." *See* 18 U.S.C. § 1962(c). Defendants assert that plaintiff must suffer something more than injury from the underlying acts of mail and wire fraud — something equivalent to a "racketeering enterprise injury." The Eighth Circuit has recognized "that a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it." *Alexander Grant & Co. v. Tiffany Industries,* 742 F.2d 408, 413 (8th Cir. 1984). Racketeering enterprise injury has been construed to require an injury resulting from mobster activity or the efforts of organized crime, *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482 (2d Cir. 1984), *cert. granted,* 53 U.S.L.W. (January 15, 1985), and to require a commercial or competitive injury, *North Barrington Development Inc. v. Fanslow,* 547 F.Supp. 207 (N.D. Ill. 1980); *Van Schaick v. Church of Scientology,* 535 F.Supp. 1125 (D. Mass. 1982). The Eighth Circuit, however, has expressly rejected these restrictions. *Bennett v. Berg,* 685 F.2d at 1059-61.

The Court believes that the Eighth Circuit has construed the "by reason of" language to require that a distinct enterprise exist through which the racketeering activity is conducted. *See Alexander Grant & Co. v. Tiffany Industries,* 742 F.2d at 413 ("We have characterized the attempt to limit the scope of RICO by seizing on the 'by reason of' language contained in section 1964(c) as a 'reiterat[ion] in new guise [of] the argument that no [distinct] 'enterprise' is alleged.") Although the *Alexander* court viewed its deci-

sion as consistent with the requirement that civil RICO plaintiffs must show something more than injury from the underlying predicate acts, *Alexander* did not address what that something more was. *Id.* Therefore, *Bennett* controls this Court's interpretation of "something more." In *Bennett,* the Eighth Circuit defined that concept as requiring proof of a separate enterprise. The *Bennett* court stated, "[b]y requiring proof of an 'enterprise,' RICO requires proof of a fact other than the facts required to prove the predicate acts of racketeering." *Bennett v. Berg,* 685 F.2d at 1060. Since Mintex qualifies as a separate enterprise under RICO and the remaining elements of a RICO violation have been shown, plaintiff has proven his RICO claim.

III. Damages

Although the Court has found for plaintiff on all four counts, plaintiff is not entitled to a multiple recovery for the same injury. *See Twin City Federal Savings & Loan Association v. Transamerica Insurance Company,* 491 F.2d 1122, 1124 (8th Cir. 1974). The Court has concluded that, as a matter of law, the damages awarded under Count III (RICO) subsume those under the remaining counts, including the punitive damages found under count IV. In other words, the treble damages awarded under count III duplicate the punitive damages provided under count IV.

Of course, should an appellate court hold that a RICO cause of action is not appropriate under these facts, then the damages found on the remaining counts would be awarded to the extent they are not duplicative.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT
Nos. 85-5138 & 85-5221-MN
Thomas A. Holmberg,

Appellee,

vs.

Rodney C. Morrisette, et al.,

Appellants.

Appeals from the United States District Court
for the District of Minnesota

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 16, 1986

STATUTES INVOLVED

Relevant Sections of Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961 et seq.
Section 1961, 18 U.S.C. § 1961. Definitions

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to

counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information, section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (c) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law

of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

Section 1962(c), 18 U.S.C. § 1962(c). Prohibited Activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1964(c), 18 U.S.C. § 1964(c). Civil Remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 3575(e), 18 U.S.C. § 3575(e)

(e) For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Nos. 85-5138/5221

JUDGMENT

Douglas A. Holmberg,

Appellee,

v.

Rodney C. Morrisette, et al.,

Appellants.

Appeal from the United States District Court
for the District of Minnesota

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court be affirmed in part, reversed in part and remanded to the district court for proceedings consistent with the opinion of this Court.

September 3, 1986

A true copy.

ATTEST:

/s/ ROBERT D. ST. VRAIN.
Clerk, U.S. Court of Appeals, Eighth Circuit

11/6/86

Filed: Nov. 10, 1986, Francis E. Dosal, Clerk
By: JMK, Deputy Clerk

Supreme Court, U.S.
FILED
APR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1174

In The
Supreme Court of the United States
October Term, 1986

DOUGLAS A. HOLMBERG,

Petitioner,

vs.

RODNEY C. MORRISETTE and MINTEX CORPORATION, a Minnesota corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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No. 86-1174

In The
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DOUGLAS A. HOLMBERG,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 800 F.2d 205 and is reprinted in the Petition Appendix. The District Court's Findings of Facts, Conclusions of Law, and Order for Judgment and Memorandum is also included in the Petitioner's Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1986. The Respondents acknowledged that this Court has jurisdiction to hear the Writ.

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STATUTES INVOLVED

The Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. §§ 1961-1968, as amended (RICO), and 18 U.S.C. § 3575(e).

The relevant sections of these statutes are set forth in the Petitioner's Appendix.

———o———

STATEMENT OF THE CASE

A. The District Court's Findings of Fact and Conclusions of Law

The District Court awarded treble damages under RICO and actual and common law punitive damages against the Respondents. The actual damages awarded were One Hundred Twenty Five Thousand and No/100 ($125,000.00) Dollars, and pursuant to RICO, would treble to Three Hundred Seventy Five Thousand and No/100 ($375,000.00) Dollars. The District Court also awarded attorney's fees to Petitioner pursuant to RICO. The District Court further concluded that in the event RICO damages were not upheld, common law punitive

damages in the amount of Two Hundred Fifty Thousand and No/100 ($250,000.00) Dollars should be awarded to the Petitioner.

Respondent Mintex Corporation is a Minnesota corporation which produces wall plaques. Respondent Rodney Morrisette at times relevant to this case was the President of Mintex, and the owner of fifty (50%) per cent of the stock. Trans World Services, Inc. (TWS) is a Minnesota corporation engaged in export trading. TWS would normally purchase goods and provide security by obtaining a letter of credit from investors. TWS would be the initial beneficiary of the letter of credit, and then transfer the letter of credit to Mintex to secure payment for production of the goods. If TWS did not pay for the goods, Mintex could use the letter of credit to obtain payment.

In September 1981, Mintex agreed to supply TWS with product which was destined for shipment to a Nigerian importer, G.N.A. Hamzer & Company. TWS secured the purchase with a series of letters of credit, including a One Hundred Twenty-five Thousand and No/100 ($125,000.00) Dollar letter of credit from the Petitioner, a Twenty-five Thousand and No/100 ($25,000.00) Dollar letter of credit from Gilbert Watson, and a Twenty-five Thousand and No/100 ($25,000.00) Dollar letter of credit from Peter DeJongh.

Mintex produced Sixty-five Thousand Two Hundred Thirty-two and No/100 ($65,232.00) Dollars worth of product and shipped it to Hamzer in Nigeria by December 1981. By May of 1982, Mintex produced an additional Two Hundred Sixty-four Thousand Twenty-one and No/100

($264,021.00) Dollars worth of product for Hamzer, which TWS stored in Illinois. Mintex was not paid for any of the product.

The letters of credit submitted by Mr. DeJongh and Mr. Watson required that Mintex supply the bank with an Ocean Bill of Lading in order to receive payment on the letters of credit. TWS shipped the Sixty-five Thousand Two Hundred Thirty-two and No/100 ($65,232.00) Dollars worth of goods to Hamzer by air rather than ocean, but Mintex actually had supplied Sixty-five Thousand Two Hundred Thirty-two and No/100 ($65,232.00) Dollars worth of goods to Nigeria for which it had not been paid. In June 1982, the Respondents requested and received payment on the DeJongh letter of credit and in October 1982 Respondents drew down on the Watson letter of credit. Neither Mr. DeJongh nor Mr. Watson made any claim that the Respondents acted improperly in drawing on the letters of credit, and the banks involved, concluded that even though the product had been shipped by air rather than sea, there had been substantial compliance with the terms of the letters of credit and allowed the Respondents to draw down on them.

With respect to Petitioner's letter of credit, the terms of the letter of credit required either in an Air or Ocean Bill of Lading. Payment on the letter of credit was predicated on shipment of the goods to Hamzer, and draw down on the letter of credit could not occur until after shipment. The District Court found that the Respondent submitted invoices to the Petitioner's bank indicating that One Hundred Ninety-three Thousand Nine Hundred Sixty-four and No/100 ($193,964.00) Dollars worth of plaques had been manufactured and shipped to Hamzer in October and November 1981. The District Court found that in fact, the

documents were false and misleading, since TWS had shipped only Sixty-five Thousand Two Hundred Thirty-two and No/100 ($65,232.00) Dollars worth of goods to Hamzer. The remainder of the goods were in a warehouse in Illinois. The District Court found that since Hamzer was a customer of TWS, and not Mintex, Hamzer did not owe the Respondents One Hundred Ninety-three Thousand Nine Hundred Sixty-four and No/100 ($193,964.00) Dollars.

In addition to collecting on the letters of credit, Mintex commenced a replevin action in Illinois on October 9, 1982 to recover the goods in the Illinois warehouse. In its Replevin Complaint, Mintex represented that it owned the goods in the warehouse.

The District Court concluded that the Respondents fraudulently altered the documents used to support its draw down on the Petitioner's letter of credit. The District Court further concluded that the pattern requirement of RICO was met due to the fact the Respondents fraudulently drew down on the DeJongh and Watson letters of credit by submitting an Air Bill of Lading instead of an Ocean Bill of Lading as was required by the letters of credit. The District Court further concluded that the Respondents had acted fraudulently by stating in its Illinois Replevin Action that it owned the goods in the Illinois warehouse.

B. The Decision of the Court of Appeals

On appeal, the Eighth Circuit Court of Appeals affirmed the District Court's Findings for Actual and Punitive Damages. The Eighth Circuit overturned the RICO portion of the District Court's Judgment on the

grounds that the Respondents' actions with respect to the DeJongh, Watson, and the replevin action did not constitute requisite pattern of racketeering activity required by 18 U.S.C. 1962(c). Accordingly, the Eighth Circuit reversed the District Court's Conclusions of Law on RICO and remanded the case to reset the common law punitive damages award.

———o———

REASONS THAT THE WRIT SHOULD NOT BE GRANTED

A. The Decision Below Does Not Raise Questions of Exceptional Importance Which Should Be Settled By This Court

The Respondents acknowledge that the issue of what constitutes pattern within the context of RICO is an important issue which should be considered by this Court. The Respondents also acknowledge that different Circuits and different Districts within some of the Circuits, have differing interpretations of the pattern requirement. It is the position of the Respondents however that applying the RICO Statute to the facts of the instant case, the District Court's RICO Ruling is not proper under any of the various interpretations of the pattern requirement of RICO.

The Petitioner identifies four different tests used to satisfy the pattern requirement by various Courts. The first test requires only two related acts of mail or wire fraud to establish a RICO pattern. *United States vs. Tom,* 787 F.2d 65 (2nd Cir. 1986); *R.A.G.S. Couture, Inc. vs. Hyatt,* 774 F.2d 1350 (5th Cir. 1985); and *Illinois Department of Revenue vs. Phillips,* 771 F.2d 312 (7th Cir. 1985).

The *R.A.G.S.* case involved a Motion for Summary Judgment, and the Fifth Circuit simply ruled that at that stage of the proceedings, it could not say that the two alleged acts of mail fraud were not enough to satisfy the pattern requirement. The *U.S. vs. Tom* case involved a Motion to Dismiss an Indictment Prior to Trial, and the Second Circuit Court of Appeals simply held that since two acts of racketeering activity were alleged, and two acts may be enough to satisfy the pattern requirement, it would be improper to dismiss the indictment. The findings in the *Tom* case and the *R.A.G.S.* case would likely be upheld under any interpretation of the pattern requirement. In the *Illinois Department of Revenue* case, the Seventh Circuit held that the mere existence of several separate offenses of mail fraud were sufficient to constitute a pattern of racketeering activity, relying on its earlier findings in the case of *United States vs. Weatherspoon,* 581 F.2d 595 (7th Cir. 1978). The Seventh Circuit later held however in the case of *Morgan vs. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986) that to the degree that prior to *Sedima S.P.R.L. vs. Imrex Co., Inc.,* 105 S.Ct. 3275 (1985) the Seventh Circuit said that two predicate acts invariably constitute a pattern as it said in the *Weatherspoon* case, such statements are no longer valid (*Morgan* at page 975).

To the extent that the Petitioner interprets the findings of *Tom, R.A.G.S.* and *Illinois Department of Revenue* to hold that the mere existence of two related acts of mail or wire fraud to establish a RICO pattern, the rulings in these cases are contrary to *Sedima S.P.R.L. vs. Imrex Co., Inc.,* 105 S.Ct. 3275 (1985). As footnote No. 14 in *Sedima* states, continuity plus relationship combines to

produce a pattern. The mere existence of a relationship alone is not sufficient to produce a pattern.

The second test identified by the Petitioner is the test applied by the Courts in the *United States vs. Teitler,* 802 F.2d 606 (2nd Cir. 1986) and *Bank of America vs. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986), which require a showing of more than one racketeering act and the threat of a continuing activity. Under this test, the continuity factor is paramount. As the Court in *Ghouth vs. Conticommodity Services, Inc.,* 642 F.Supp. 1325 (N.D. Ill. 1986) indicates, continuity presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity. As the Court in *Ghouth* further states, two or more mailings which further just one criminal end might satisfy the "relationship" test, but they do not by themselves evidence continuity or a threat of continuing activity.

The Eighth Circuit Court of Appeals in the instant case concluded that the Respondents' actions comprised one scheme to draw down three letters of credit securing Mintex's transactions with TWS with respect to goods specifically produced by Mintex for shipment to Nigeria. As the Court states, the Respondents' actions were a misguided attempt to obtain payment for goods which they had produced, yet over which they had lost control. The facts of the instant case are more akin to the facts of *Frankarf Distributing, Inc. vs. RMR Advertising, Inc.,* 632 F.Supp. 1198 (S.P.N.Y. 1986) where there were multiple mailings, but they were done as part of one fraud involving one contractual relationship. The Court in *Frankarf* ruled that since there was a distinct and easily

defined beginning and end of the transactions, and there was no threat of continuing activity, the pattern requirement was not met.

The Eighth Circuit in this case concluded that there was no evidence that Mintex or Morrisette had engaged in like activities in the past or that they were engaged in other criminal activities. Following the continuity test relied on by the Courts in *United States vs. Teitler,* 802 F.2d 606 (2nd Cir. 1986) and *Bank of America vs. Touche Ross & Co.,* 782 F.2d 1966 (11th Cir. 1986), the Eighth Circuit was right that there was no continuity, and therefore was right in reversing the judgment on the RICO claim.

A third test identified by the Petitioner is that the predicate acts must be ongoing over an identified period of time so that they can therefore be viewed as constituting separate transactions. *Morgan vs. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986). In *Morgan,* the Defendants formed a series of corporations and made a series of false representations to the Plaintiffs to induce the Plaintiffs to invest in the corporations and to guaranty loans of the corporations. The allegation in *Morgan* was that the bank worked with the owners of a drug store in defaulting on a loan, foreclosing on the loan, selling the assets of the foreclosed drug store to a separate drug store owned by the same parties, all guaranteed by the Plaintiffs. As the Court concluded, the same scenario was repeated seventeen (17) months later when the second drug store defaulted, the bank foreclosed, the owners of the corporation formed a new corporation and bought the assets from the foreclosure sale, exposing the Plaintiffs to a deficiency

judgment. These were clearly two distinct transactions with their being a beginning to the first transaction, a conclusion, a seventeen (17) month lull, the beginning of a second transaction, and the end of the second transaction.

There was no separate transactions in the instant case. There was one sale of goods to TWS by Mintex for shipment to Nigeria which were secured by three different letters of credit. The Respondents produced one set of goods on one contract, and as the Court of Appeals stated, the Respondents' actions were a misguided attempt to obtain payment. It is interesting to note that in ruling, the Eighth Circuit relied on the language of a Seventh Circuit District Court in *Northern Trust Bank/O'Hare, N.A. vs. Inryco, Inc.*, 615 F.Supp. 828 (N.D. Ill. 1985) and stating, "It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern' of racketeering activity." (At 931).

The fourth test identified by the Petitioner is a test used by the Eighth Circuit in the case of *Superior Oil vs. Fulmer*, 785 F.2d 252 (8th Cir. 1986). The Eighth Circuit did specifically rely on the *Superior Oil* case in reaching its decision in the instant case.

It is the position of the Respondents that no matter what test is applied, the Eighth Circuit was correct in overturning the RICO count of the judgment. Under all of the tests applied, there must be a continuity plus a relationship in order to produce a pattern. The Eighth Circuit simply ruled that there was no evidence that Mintex or Morrisette had engaged in like activities in the past or that they were engaged in other criminal activ-

ities. In other words, there was no continuity, and thus no pattern. Such a determination was not in conflict with the wording of the statute, the decisions of the other Circuits, or the decision of this Court in the case of *Sedima S.P.R.L. vs. Imrex Co., Inc.,* 105 S.Ct. 3275 (1985).

The Petitioner argues that Respondents' activities in the instant case amount to a pattern under *Sedima* by quoting the following statement from *Sedima:*

> "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

Sedima, 105 S.Ct. at 3285 n.14.

The Petitioner argues that the Respondents' activities in providing false and misleading documentation in an effort to collect on the Petitioner's letter of credit were part of the same pattern as the Respondents' activities in drawing down on the DeJongh and Watson's letters of credit and filing the replevin action in Illinois. While it is true that all of the actions were an attempt to collect money, it was only in the Petitioner's case that the Court of Appeals determined that false or misleading documents were presented. In the case of DeJongh and Watson letters of credit, the Respondents simply presented documentation that more than Twenty-five Thousand and No/100 ($25,000.00) Dollars worth of goods had been shipped to Nigeria and payment was not received. In fact Sixty-five Thousand and No/100 ($65,000.00) Dollars had been shipped to Nigeria of which payment was due. The only problems on the DeJongh and Watson letters of credit

was the Bill of Lading supplied to the banks by the Respondents was in an Air Bill of Lading as opposed to a Ocean Bill of Lading, as required by the letters of credit. There was no evidence that the Respondents in any way altered or presented the Bill of Ladings in a misleading manner. There was no evidence that any of the banks involved with Mr. DeJongh and Mr. Watson determined that a fraud had been committed against them, or that they had been damaged in any way by the fact that an Air Bill of Lading was presented as opposed to an Ocean Bill of Lading. At best a determination could be made that the banks wrongfully allowed the Respondents to draw down on the letters of credit when all of the technical requirements of the letters of credit had not been met, but the acts of the Respondents were not the same or similar to the acts involved in the Holmberg letter of credit.

With respect to the replevin action in Illinois, it is undisputed that there was a large quantity of goods which the Respondents had produced in the warehouse for which it had not been paid. It is difficult to determine how any fraud was committed upon the Court in Illinois, but if it was, its only similarity to the acts involving the Petitioner was that it was an attempt to get paid for goods. The results, the participants, the victims, and the methods of commission was not related in any manner.

As the Respondents indicated earlier in this Brief, it is not disputed that certain discrepancies exist between the various Circuits in defining the pattern requirement of RICO. It is the position of the Respondents however that under any interpretation of the pattern requirement of RICO, the activities of the Respondents in the instant

case do not meet the continuity plus relationship combination necessary to form a pattern.

B. The Holmberg Decision Does Not Threaten To Create A Different Standard Of Review For Civil RICO vs. Criminal RICO

The Petitioner argues that by requiring criminal acts to be related in order to invoke RICO the Eighth Circuit in the instant case created a different standard of review for Civil RICO cases. If that is true, the Supreme Court has already done that in the *Sedima* case by holding that pattern requires continuity plus relationship. All of the cases cited by the Petitioner in support of his contention that the Eighth Circuit set up a separate standard of review occurred prior to *Sedima,* with the exception of the case of *United States vs. Tom,* 787 F.2d 65 (2nd Cir. 1986). As the Court stated in *Morgan vs. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986), to the extent Courts held that two predicate acts invariably constitute a pattern prior to *Sedima,* such was not the case after *Sedima.* With respect to the *United States vs. Tom,* supra case, the Court did not conclude that two acts did constitute a pattern, but rather that since the ruling was on a Motion to Dismiss an Indictment, two such acts may constitute a pattern.

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CONCLUSION

While there are various interpretations of the pattern requirement of RICO used in the various Circuit Courts, the ruling of the Eighth Circuit Court of Appeals on this case was valid under any interpretation of pattern. For that reason, the instant case is not an appropriate case for Certiorari to be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1174

IN THE

Supreme Court of the United States

October Term, 1986

Douglas A. Holmberg,

Petitioner,

v.

Rodney C. Morrisette and Mintex Corporation, a Minnesota corporation,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner's Supplemental Brief In Support of Petition For Writ of Certiorari

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REASONS FOR GRANTING THE WRIT

INTRODUCTION

Petitioner respectfully submits this supplemental brief in support of its petition for writ of certiorari.

This supplemental brief is offered to bring to the Court's attention the recent decisions in *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986), *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987), *Marks v. Forster*, 811 F.2d 1108 (7th Cir. 1987), and *International Data Bank*,

Ltd. v. Zepkin, No. 86-2052 (4th Cir. Feb. 20, 1987) (available Feb. 25, 1987, on WESTLAW, CTA database.)

A. The Eighth Circuit's decision in the present case sharply conflicts with the Second Circuit's recent decision in Ianniello.

In *United States v. Ianniello* the Second Circuit offered a detailed discussion of the pattern requirement under the Racketeer Influenced and Corrupt Organizations Act ("RICO" or the "Act"). *United States v. Ianniello*, 808 F.2d 189-193. The Second Circuit strictly construed RICO and concluded that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise that the elements of a pattern of racketeering activity have been satisfied. *Ianniello*, 808 F.2d at 192. In *Ianniello*, the Second Circuit expressly rejected the Eighth Circuit's definition of pattern of racketeering activity as expressed in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). The Second Circuit observed that the multiple scheme requirement that is favored by the Eighth Circuit would create incongruous results. *Ianniello*, 808 F.2d at 192.

The Second Circuit's decision in *Ianniello* is critical because it demonstrates that the circuits have created two different standards of review: one for criminal RICO and one for civil RICO. The government has enjoyed considerable success using criminal RICO. That success would be jeopardized if the relaxed, broader standard articulated by the Eighth Circuit in the instant case were adopted. In *Ianniello* two criminal acts in furtherance of an enterprise were sufficient to support a criminal conviction. In the instant case and under the multiple scheme test articulated

by the Eighth Circuit, two criminal acts would not necessarily support a conviction under RICO. Ultimately, the viability of the Act in both the criminal and civil arenas will be undermined by the growing confusion among the circuits.

B. The recent decisions of the Fourth, Seventh and Tenth Circuits' demonstrate an abundance of confusion with respect to the meaning of a pattern of Racketeering Activity.

In *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987), the court did not discern a pattern of racketeering activity, but readily conceded that it was having difficulty resolving this troublesome question and that it was unable to formulate ". . . a bright-line test in the abstract . . ." regarding the definition of a pattern of racketeering activity. *Id.* at 929. The court apparently concluded that because the scheme involved only one victim it must have only involved one fraudulent scheme. Therefore, the elements of a "pattern" had not been satisfied. *Id.* at 929. The court, however, proceeded to appologize for its inability to provide ". . . precise guidance on this troublesome issue . . ." *Id.* at 929.

In *International Data Bank, Ltd. v. Zepkin*, No. 86-2050. (4th Cir. Feb. 20, 1987), the Fourth Circuit conceded that plaintiff's RICO claim was not properly before the court but, nevertheless, contributed to the confusion surrounding RICO by holding that the RICO claim would be deficient with respect to the pattern requirement. After reviewing various conflicting opinions, the Fourth Circuit concluded "[I]n our view, no mechanical test can determine the existence of a RICO pattern". *International Data Bank v.*

Zepkin, slip. op. at 15. Without a mechanical test or any "precise guidance", the court applied a status test which had been previously rejected by this Court in *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985). The Fourth Circuit concluded that "[T]he pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes". *International Data Bank v. Zepkin*, slip. op. at 14. In the Fourth Circuit the status of the defendant as one who regularly committed racketeering acts and not the character of the acts appears dispositive on the question of the definition of a pattern of racketeering activity.

In *Marks v. Forster*, 811 F.2d 1108 (7th Cir. 1987), in finding that a pattern did not exist, the Seventh Circuit was forced to distinguish at least three prior Seventh Circuit decisions on the question. *See, Illinois Department of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985); *Lipin Enterprises v. Lee*, 803 F.2d 322 (7th Cir. 1986); *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986). The court's tortured analysis in *Marks* highlights the difficulties that circuit and district courts are faced with when they depart from the plain language of the Act. In *Marks*, despite the court's best efforts, it was unable to provide any meaningful guidance on the definition of a "pattern" of racketeering activity.

In the Second Circuit, one victim and two predicate acts appear to be sufficient to satisfy a pattern of racketeering activity. In the Eighth Circuit, multiple victims, acts and criminal schemes are necessary to satisfy the pattern requirement. The Fourth Circuit is admittedly uncertain of the requirements and in the Seventh Circuit there are at least four different definitions with no single common thread.

CONCLUSION

The *Ianniello* decision demonstrates a sharp division between the Second and Eighth circuits. It also contributes to the double standard that is being created for civil and criminal RICO. That double standard may ultimately undermine RICO's effectiveness in the criminal area.

The aforementioned cases also underscore the significant confusion that exists among the circuits and illuminates the need for the Supreme Court's consideration of this troublesome question. For the reasons set forth herein, petitioner respectfully requests that a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on September 3, 1986.

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